JUN 25 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually,

Petitioners,

vs.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually,

Petitioners,

vs.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners, James Charles Payne, et al., pray that a Writ of Certiorari issue to review the order of the Florida Supreme Court entered in the above-entitled case on February 25, 1974.

CITATIONS TO OPINIONS BELOW

The order of the Florida Supreme Court is set forth in full in the Appendix hereto. (A1)

JURISDICTION

The Florida Supreme Court issued an order on February 25, 1974 denying Petitioners' Writs of Certiorari. (A1) The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257 and 28 U.S.C. Supreme Court Rule 19, the Supreme Court of the United States by Order of May 20, 1974 having accorded an extension of time within which to petition for certiorari to June 26, inclusive. (A2)

QUESTIONS PRESENTED

1. WHETHER THE SYSTEMATIC, INTENTIONAL, AND DISCRIMINATORY EXCLUSION FROM PETIT JURY SERVICE OF TWO IDENTIFIABLE CLASSES OF CITIZENS, SPECIFICALLY, YOUNG ADULTS, AGES EIGHTEEN TO TWENTY, INCLUSIVE, AND THE ELDERLY OVER THE AGE OF SIXTY-FIVE, EITHER INDIVIDUALLY OR COLLECTIVELY, VIOLATES PETITIONERS' RIGHTS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

2. WHETHER A DISPROPORTIONATE UNDERREPRESENTATION OF AN IDENTIFIABLE CLASS OF CITIZENS IN THE PETIT JURY POOL, SPECIFICALLY, THE ELDERLY OVER THE AGE OF SIXTY-FIVE, CONSTITUTES A PRIMA FACIE CASE OF A DISCRIMINATION UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

3. WHETHER FLORIDA STATUTES, SECTION 40.01 (1), DEALING WITH THE QUALIFICATION OF JURORS, WHEREIN ONLY PERSONS OF THE AGE OF

TWENTY-ONE YEARS OR OLDER, ARE QUALIFIED TO ACT AS JURORS, IS CONSTITUTIONAL IN LIGHT OF THE TWENTY-SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, WHEREIN IT IS PROVIDED THAT "THE RIGHT OF CITIZENS OF THE UNITED STATES WHO ARE EIGHTEEN YEARS OF AGE OR OLDER TO VOTE SHALL NOT BE DENIED OR ABRIDGED BY THE UNITED STATES OR BY ANY STATE ON ACCOUNT OF AGE."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions and statutes are set forth in full in the Appendix:

The Fourteenth Amendment to the United States Constitution. (A3)

The Twenty-Sixth Amendment to the United States Constitution. (A3)

Florida Statutes 40.01 (1). (A3)

STATEMENT OF THE CASE

On April 6, 1971, Petitioners filed their Complaint based on damages arising out of an accident which occurred on February 11, 1971. In said accident, the minor petitioner was struck by a police cruiser while he was driving a motorcycle in Fort Lauderdale, Broward County, Florida. The police cruiser was owned by the Respondent, Leo Richard Paulin. At the time of the accident, Respondent Paulin was an officer in the Fort Lauderdale Police Department and was acting within the course and scope of his

employment. As a result of the accident, the minor petitioner's left leg, as well as a finger, were amputated.

Jury trial of the case was had on the 7th through the 11th day of February, 1972, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. However, on the date of the trial, prior to its commencement, and before the selection of the jury, Petitioners moved to quash the entire panel. Said motion was predicated on two grounds: One, that all persons between the ages of eighteen and twenty years of age, inclusive, had been systematically excluded from the jury list; and, two, all individuals over the age of sixty-five had likewise been excluded. (A23-A24)

The Trial Court conducted a hearing on the merits of Petitioners' challenge. At said hearing, it was determined that the exclusion of the young adults was based on Florida law (Section 40.01 (1)), but that the exclusion of the elderly *violated* Florida law. (Emphasis supplied) When the Broward County Supervisor of Elections prepared the jury list, she was not cognizant of the fact that Florida Statutes, Section 40.08 had been amended so that citizens over sixty-five years of age were no longer exempt from jury service. (A21-A24) Therefore, a jury list was drawn that illegally failed to include a segment of the community representing approximately 75,000 people. (A56-A57) It was later determined at a post-trial hearing that there was at least one citizen on the jury list who was over sixty-five. (A41) However, it is obvious from the record that the jury list contained only a token representation of said class.

Despite this startling revelation, the Trial Court nevertheless overruled Petitioners' challenge on the grounds that no showing of prejudice to Petitioners existed. (A27-

A28) Accordingly, the trial was commenced over the Petitioners' objections, the jury returning February 11, 1972, with verdicts exonerating both Respondents.

A final judgment was entered on this verdict on February 25, 1972, the same being recorded in Circuit Court, Minute Book 242 at Page 595 on that date. (A79) Petitioners' Motion for New Trial alleging *inter alia*, that the jury was illegally constituted was denied. (A80-A81) Thereafter, Petitioners timely filed their Notice of Appeal and Assignments of Error. (A82-A84)

Petitioners presented the Fourth District Court of Appeals of the State of Florida with the question of whether the composition of the petit jury panel in the case at bar was unconstitutional because of the systematic exclusion of two identifiable classes of individuals that were eligible for jury duty. Included in such question and expressly reserved (A88-A89) was Petitioners' contention that Florida Statutes, Section 40.01 (1) was unconstitutional. The District Court of Appeal per curiam affirmed the judgment of the Trial Court (A90), and subsequently denied a timely filed Petition for Rehearing. (A91)

Thereafter, two Petitions for Writ of Certiorari were timely filed in the Supreme Court of Florida on September 28, 1973, which Petitions were subsequently consolidated for appellate purposes by the Court. (A92-A101) Therein, Petitioners prayed for an Order quashing the decisions and orders sought to be reviewed on the grounds that the composition of the petit jury panel was unconstitutional due to the systematic exclusion of the aforementioned identifiable classes of individuals eligible for jury duty. The Florida Supreme Court having denied the relief sought, the Petitioners now file in this Honorable Court, their Petition for Writ of Certiorari to the Supreme Court of the State of Florida.

REASONS FOR GRANTING THE WRIT

1. The present posture of the instant litigation reflects affirmance of the Trial Court's holding that Petitioners' rights of due process and equal protection under the Fourteenth Amendment were not violated by the systematic exclusion of two identifiable classes of citizens. Accordingly, it is contrary to the applicable dictates of this Court and, therefore, review of this case would constitute an exercise of sound judicial discretion.

As declared by this Honorable Court:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Smith* v. *Texas*, 311 U.S. 128, 130, 85 L.Ed. 84, 61 S. Ct. 164 (1940).

Yet, despite this unequivocal and mandatory language, the undisputed evidence in this case points to the employment by local authorities of a jury selection procedure that was incapable of providing:

> ". . . a fair possibility for obtaining a representative cross-section of the community." *Williams* v. *Florida*, 399 U.S. 78, 100, 26 L.Ed. 2d 446, 90 S. Ct. 1893 (1970).

The fact that the minor respondent was at the time of trial a member of a sizeable class of electors between the ages of 18 and 20 inclusive, who were systematically excluded from the rolls of eligible jurors is regrettable and arguably illegal. Nevertheless, it is understandable in view of Florida Statutes 40.01(1) which excludes anyone below the age of twenty-one from jury service. However, systematic exclusion from jury service of all citizens

in Broward County over the age of sixty-five in contravention of state law is not only unconstitutional, but also unconscionable.

Petitioners further contend that contrary to the basis upon which the Trial Court rested its denial of their Motion to Quash, it is not necessary that they show how they were harmed by the errors in the jury selection process. As recently declared by the Supreme Court,

> "When a . . . petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim." *Peters* v. *Kiff*, 407 U.S. 493, 498, 33 L.Ed. 2d 83, 92 S. Ct. 2163 (1972).

Instead,

> ". . . The evil lies in the admitted wholesale exclusion of a large class . . . in disregard of the high standards of jury selection." *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, 225, 90 L.Ed. 1181 (1946).

2. Secondly, the Petitioners contend that the presence on the disputed jury list of at least one person over the age of sixty-five does not cure the panel of its unconstitutional taint. (A41-A44)

That such is true is evidenced by the fact that the corrected list of eligible jurors succeeding the one in question contained the names of over *75,000* individuals over the age of sixty-five who theretofore had been illegally excluded from the list (emphasis supplied).

The inclusion of the one individual on the jury list owed itself to an individual affirmative act on said person's part. However, to require such an affirmative act from a class that is already eligible for jury service constitutes a systematic exclusion that this Court has re-

peatedly declared violative of the United States Constitution. In other words, this Court should not allow the shine of tokenism to be substituted for the substance of justice.

3. The Twenty-Sixth Amendment to the United States Constitution, which made citizens 18 years and older members of the eligible electorate, does not specifically refer or allude to an individual's right to participate in jury service. However, Petitioner respectfully submits that inherent in the right to vote—the right to participate in the determination of issues of local and national concern, and to analyze and express an opinion on the integrity and qualifications of candidates for public office—is the right to participate in jury service, i.e., to participate in the determination of the merits of a litigant's claim or the guilt or innocence of an individual charged with a criminal violation.

Just as the Constitution does not explicitly mention any right of privacy, the Supreme Court has recognized that a right of personal privacy, or a guaranty of certain areas or zones of privacy, does exist under the Constitution. *Roe* v. *Wade*, 410 U.S. 113, 35 L.Ed. 2d 147, 93 S. Ct. 705 (1973); *Griswold* v. *Connecticut*, 381 U.S. at 484-485, 14 L.Ed. 2d 510, 85 S. Ct. 1678 (1965); *Stanley* v. *Georgia*, 394 U.S. 557, 564, 22 L.Ed. 2d 542, 89 S. Ct. 1243 (1969); *Terry* v. *Ohio*, 393 U.S. 1, 8-9, 20 L.Ed. 2d 889, 88 S. Ct. 1868 (1968); *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251, 35 L.Ed. 734, 11 S. Ct. 1000 (1891).

Similarly, therefore, Petitioners contend that the penumbras of the Twenty-Sixth Amendment and the Bill of Rights posit in individuals aged eighteen, nineteen and twenty, the right to serve on juries. Accordingly, it is respectfully submitted that Florida Statutes, Section 40.01 (1) dealing with the qualifications of jurors, wherein only

persons of the age of twenty-one years or older are qualified to act as jurors, is unconstitutional in light of the Twenty-Sixth Amendment of the United States Constitution and in light of the foregoing cited authorities interpreting the Constitution to guaranty to citizens not only those rights explicitly denominated in the Constitution, but also to guaranty those penumbral rights inherent in the provisions of the Constitution.

CONCLUSION

The Petitioners herein were denied basic fundamental rights guaranteed to them under the United States Constitution. They seek relief in this Court to restore these rights to them. Based on the arguments and authorities cited herein, Petitioners, James Charles Payne, a minor by and through his next friend and father, Walter Payne and Walter Payne individually, request this Honorable Court to grant a Petition for a Writ of Certiorari to the Supreme Court of the State of Florida so that not only may their rights be protected but also the rights of all citizens who fall or may fall within the same situations confronting the petitioners herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of attached Petition for Writ of Certiorari was mailed to Frank E. Maloney, Jr., American National Bank Building, 1415 E. Sunrise Boulevard, Fort Lauderdale, Florida, this 24th day of June, 1974.

DRUCK, GRIMMETT, NORMAN & WEAVER
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By JAMES D. DRUCK

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

ORDER

SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1974

MONDAY, FEBRUARY 25, 1974

CASE NOS. 44,423 and 44,424

DISTRICT COURT OF APPEAL,
FOURTH DISTRICT

72-514

JAMES CHARLES PAYNE, etc., et al.,
Petitioners,

vs.

CITY OF FORT LAUDERDALE, et al.,
Respondents.

These causes having heretofore been submitted to the Court on Petitions for Writs of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petitions for Writ of Certiorari be and the same are hereby denied.

ERVIN, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur

CC: Hon. E. J. Comiskey, Clerk
Hon. Stephen R. Booher, Judge
Hon. Clyde Heath, Clerk
Kirsch, Druck & Mills
(Hon. Ben J. Weaver)
Fleming, O'Bryan & Fleming
(Hon. Frank E. Maloney, Jr.)

SUPREME COURT OF THE UNITED STATES

No. A-1107

JAMES CHARLES PAYNE,
Petitioner

v.

CITY OF FORT LAUDERDALE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 26, 1974.

/s/ Lewis F. Powell
Associate Justice of the Supreme Court of the United States

Dated this 20th day of MAY, 1974.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Twenty-Sixth Amendment to the United States Constitution

Section 1. The right of citizens of the United States who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Florida Statutes, Section 40.01(1)

Qualifications and disqualifications of jurors:

(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state and who have resided in this state for one year and in their respective counties for six months and who are fully qualified electors of their respective counties; provided, however, that expectant mothers and mothers with children under eighteen years of age, upon their request, shall be exempted from grand and petit jury duty.

IN THE
CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

CIVIL ACTION

No. 71-2945—Booher

JAMES PAYNE, etc., et al.,
Plaintiffs,

vs.

CITY OF FORT LAUDERDALE, etc., et al.,
Defendants.

Fort Lauderdale, Florida
February 7, 1972
9:00 o'clock A.M.

APPEARANCES:

KIRSCH, DRUCK & MILLS, ESQS., by RICHARD R. KIRSCH, ESQ., of counsel, appearing on behalf of the Plaintiffs.

FLEMING, O'BRYAN & FLEMING, ESQS., by FRANK HAMILTON, ESQ., of counsel, appearing on behalf of the Defendants.

EXCERPT OF PROCEEDINGS

* * * * * * *

[2] MR. KIRSCH: If the Court please, the Plaintiff at this point challenges the entire panel for the reason the jury is composed and comprises people all over the age of 21 years. It is our contention here that as of the time that the federal government said that all 18 year olds should have the right to vote, that they should now be included as part of the venire.

THE COURT: Doesn't the statute provide that they shall be 21 years of age?

MR. KIRSCH: That may be what the statute says. That's not what the federal law says.

We have here a boy, a minor, and he is 19 years old, entitled to be judged by his peers, with at least some jurors of his age group. Now I don't know what the Appellate Court might or might not say, but when the congress said that all 18 year olds throughout the United States shall have the right to vote, I think that qualifies them to serve on jury duty. In the State of Florida 21 years of age was the limit on jurors, in connection with their right to vote, to be electors, and obviously their names would never get into the jury box if they weren't qualified electors, which they were not. Now they are.

THE COURT: Interesting point.

MR. HAMILTON: I don't think it is interesting at all. [3] I don't think there's been any showing of any systematic exclusion of 18 to 21 years. I frankly do not remember when congress said they have the right to vote. I know it was voted down in September, voted down by the State of Florida a year ago.

MR. KIRSCH: They are entitled to vote in all elections as I understand, including municipal elections, and they are entitled to hold office. In my opinion, under the various--

THE COURT: Do you know whether or not they have or have not been included?

MR. KIRSCH: Sir, you ask, the very first question you asked these jurors was are all of you over the age of 21 years.

THE COURT: That is correct.

MR. KIRSCH: And all of them said yes, and that was one of your qualifications.

THE COURT: Does that mean however that the Jury Commission has excluded voters under the age of 21?

MR. KIRSCH: It is incumbent upon the Court to call those appropriate jury commissioners as witnesses, or determine from the Clerk of the Court, or whoever else might be cognizant of this, whether or not they have been excluded. As I say, as far as I know, they are excluded. As far as the Court's qualifications of these jurors is concerned, they must [4] be over the age of 21 years, and I submit to Your Honor, that under the law as it now exists 18 year olds have the right to vote in any election. They have a right to hold office.

For example, in many of your municipal charters it says must be a qualified elector, and that has always been construed as being 21 years before they could hold office. Now a qualified elector means 18. So what has happened here is 18 year olds have been systematically excluded from the jury, because they weren't qualified electors. And that deprives this boy of having one of his age group sit in judgment of this case.

THE COURT: I don't know. Certainly it would be your burden to prove that they were systematically excluded. Unless you want me to take judicial notice—

MR. KIRSCH: No, but I understand, it is my understanding of a challenge of a venire the Court must call witnesses to determine it.

If the Court wishes to deny my motion—

THE COURT: Is it my obligation to call the witnesses, or is it your obligation to call the witnesses in support of your motion?

MR. KIRSCH: I can't say it is mine, and I can't say it is yours. The rules seem to indicate a challenge to the venire, the Court shall, or may, or should determine whether there has been an exclusion. I would assume that that [5] is the same procedure that the judge in

Miami did the other day when he excused the whole 5,000 jurors because it was shown that there was discrimination in selection of the jurors.

My point is, sir, that I feel that 18 year olds have the right to serve on the jury, and I would say this, it might not be important if I had a 40 year old plaintiff here, but I have a 19 year old Plaintiff, who was 18 at the time this accident occurred. He is going to be judged by older people.

I think it would be a very simple matter for the Court to determine whether they have been excluded by merely calling the Clerk of the Court, or the head of the Jury Commission.

THE COURT: It would have to be the head of the Jury Commission. I don't think the Clerk would know.

MR. KIRSCH: They know. They operate the computer down there.

THE COURT: I don't think this panel was selected by the computer.

MR. HAMILTON: The panel was selected from the existing list of electors, right?

THE COURT: Yes.

MR. HAMILTON: I just can't see, in the first place I don't know how many 18 year olds are registered. I don't know when it became effective; not more than three months, four months ago, whatever time it was, but I just can't see [6] challenging—I'd like to challenge the panel because I don't like it, but I don't think it is proper to attack them on the basis of systematically excluded when we don't know.

THE COURT: I suggest we find out.

MR. HAMILTON: I don't think it is incumbent upon the Court at all. I think when someone makes a motion it is incumbent upon them to present testimony to support their motion.

THE COURT: This is what was done in Miami when the challenge was made, he had the Chairman of the Jury Commission right there.

MR. KIRSCH: Well if the Court please, if you give me about five minutes I think I can get Mr. Fox, head of the Jury Commission here, or get him on the phone and find out.

THE COURT: Why don't we take a recess and handle this matter in chambers.

(Whereupon, the proceedings were moved to chambers.)

THE COURT: We have been waiting for almost 45 minutes for the appearance of the Chairman of the Jury Commission. He has advised you, I understand, that 18, 19 and 20 year olds are excluded systematically from the jury panel, is that correct?

MR. KIRSCH: That is correct. And he's prepared to testify to that.

THE COURT: I have just consulted with Judge Minnet, [7] who is the Chief Judge, who has presided over the selection of the 106,000 names that are going into the computer, and he advises me that it was his instruction that Statute 40.01, subsection one be followed, and that the new panel likewise does not contain persons of the age of 18, 19 or 20 years old.

Would you be willing to stipulate that that's what Mr. Fox would testify to?

MR. HAMILTON: I'd stipulate that that's what he would say, if that's what you say he will say.

MR. KIRSCH: That's what he will say.

MR. HAMILTON: I can't believe anyone will say anyone was systematically excluded. If you say Sid Fox—

MR. KIRSCH: He may not have used the word systematically they were excluded. They were not included.

MR. HAMILTON: Did we have a list of qualified electors under the age of 21 that could have been put on this particular panel?

MR. KIRSCH: They did not make such a list because he was advised 18, 19, 20 year olds were not qualified to serve.

MR. HAMILTON: When was this list compiled?

MR. KIRSCH: They don't have such list.

MR. HAMILTON: I say when was this list compiled from which our jury panel came?

MR. KIRSCH: I don't know.

MR. HAMILTON: Because Judge Booher has said this was [8] not a computer selected panel, is that correct?

THE COURT: That is correct.

MR. HAMILTON: And you have just advised that the presiding judge, Judge Minnet, said that even when the new list is fed into the computer they will be excluded?

THE COURT: It was his view that the federal standard and the state standard were different. That we could legally have six man juries, if we chose, as we do have, while the federal standard is a 12 man jury, and we can qualify people as far as age is concerned.

MR. HAMILTON: That's my view, but I would like to know, since none of us has the precise knowledge of when the constitutional amendment became law, when the juries from which this panel was selected, the list was drawn up by Mr. Fox, was it before or after the constitutional amendment?

MR. KIRSCH: Was this list drawn pursuant to a court order, Your Honor, or was it drawn in March, or before March?

THE COURT: I can't tell you when this list was drawn. I know that I did not draw it. It was one of

the lists drawn by the presiding judge. It was computer printed, but I know the box was not filled by the computer. The new box will be the first one where the selection was by the computer rather than by the Jury Commission.

MR. HAMILTON: Well, unless there's evidence to [9] show that the panel, or the list from which this panel was drawn was prepared subsequent to the passing of the constitutional amendment, then it is academic. I do not think it has anything to do with it. If there's any way to show when it was drawn.

If it was drawn after, my position is that the federal government can't tell us the qualifications required to be a juror, and I would agree with what you said on that.

In answer to your question, Judge Booher, I don't know Sid Fox, but if that's what Dick says he will say, that they were not included on the panel, fine. But I still think we have to know when the list was drawn.

THE COURT: I can find that out for you.

MR. HAMILTON: I think that, this is my position, I will stipulate that if Mr. Fox were here to testify—

MR. KIRSCH: Mr. Fox is here now.

(Short recess.)

THE COURT: The jury computer print-out indicates that this jury was pulled on January 14th, 1972, by Judge Minnet.

MR. KIRSCH: This is Mr. Fox who is here now, if there are any questions you wish to ask him concerning this matter, other than what I've represented that 18, 19 and 20 year olds were not included in the jury selection.

MR. FOX: In the new one. Probably not in this one, [10] either. The new one they just gave us to sign 106,000.

THE COURT: Who prepared the jury list?

MR. FOX: We're given a list of names and told to pick so many jurors. They need 10,000. There's a lot of precincts. And this was given to us by the people in the jury room, I think sometime in September, and we picked them out.

MR. HAMILTON: Did you have anything to do with the selection of the people that were submitted to you, the names that were submitted to you?

MR. FOX: Yes, sir. They gave us a lot of precincts.

MR. HAMILTON: Right.

MR. FOX: And we picked out, they want 10,000, and the girl that worked there before said so many from this precinct, and so many from that precinct.

MR. HAMILTON: Who selected the names to go on this list?

MR. FOX: Another member of the Jury Commission and I.

MR. HAMILTON: And yourself?

MR. FOX: Yes, sir.

MR. HAMILTON: So then you do know of your own knowledge that in selecting the 10,000, or whatever the number was from the electors in Broward County that persons under the age of 21 were not included?

MR. FOX: No, that I don't know. There's no way [11] of knowing. There's no age on it. You know, male, female.

MR. KIRSCH: Well, you were instructed about the new list going in the computer, were you not instructed that no one under 21 should be included in that list?

MR. FOX: I asked them that. They showed me the list, and I said 18 year olds, you know, 18 can they vote on the jury, and they said no. And that was, they told me that was the law.

MR. HAMILTON: That's not the list we're operating under now. That's the new list that is going into the computer?

MR. FOX: Yes. Thursday or Friday.

THE COURT: For all we know there may be 18, 19 or 20 year olds on the prior list?

MR. FOX: Yes, sir. On the old one, there may be. I don't know. I wouldn't know because there's no age. Here's the sheets like that.

THE COURT: How did you know which ones were 18, 19 or 20 for the new list?

MR. FOX: There are none. I asked them are there 18, 19, you know, any 18 year olds on there, 19, they said no.

THE COURT: Who is they?

MR. FOX: This was Judge Franza was there, Judge Minnet, Jack Morse, and there was another gentleman from the computer office, and there was a lady representing Jack Wheeler's office. In fact, you can call up the jury room and [12] they have all the signatures who were there with Judge Minnet as presiding, you know, signing it. But I did ask that. I just wondered.

THE COURT: I don't think we've got any clear evidence then one way or the other as to this list.

MR. KIRSCH: Let me ask you this, Mr. Fox, was it represented to you that everyone on the present list were qualified voters of this state?

MR. FOX: Yes. Yes.

THE COURT: On this list?

MR. KIRSCH: Yes.

MR. FOX: Yes. Their precincts and everything. They come out like a sheet, like it would be like Ed's got, not like that—it would have been about the right size, like a court reporter's thing, I imagine, about three inches, four inches.

THE COURT: Those are the little paper slips?

MR. FOX: Yes. That was the first one we selected.

MR. KIRSCH: This 106,000 that you are talking about, what is that?

MR. FOX: That came out of a computer. We had nothing to do with the selection of that. That's every registered voter in Broward County.

MR. KIRSCH: But they still excluded all the 18, 19 or 20 year olds?

[13] MR. FOX: They're not in there, no, sir.

MR. HAMILTON: This is what you were told, Mr. Fox, you had nothing to do with the selection?

MR. FOX: No, they're taken from a computer now.

THE COURT: That would cover the future, but not the past, and there would be no way on the past list that I know of that you would know what the person's age was.

MR. KIRSCH: Well, I know this, sir, if necessary, and I don't want to proceed and prolong this thing at all, but I certainly want to try this case, if possible, and I think I can bring in every judge in Broward County who sits on jury trials, that being the Court of Record and the Circuit Court, and ask them if at any time during the past, as long as they have been sitting on the bench have they systematically asked the question is everyone here over the age of 21, and I believe they'll be able to say that as far as the courts are concerned, all during this time at no time have 18, 19 or 20 years olds appeared in court for jury duty, such as what happened this morning when you questioned the jury about whether they were all over the age of 21. Every one there was over the age of 21.

THE COURT: I know I excused somebody from service on this jury panel because he was a student at Broward Junior College and this was his exam time. He may have been 21, though. Could have been younger.

[14] MR. KIRSCH: Well Your Honor, have you had anyone sit, come for jury duty that was under 21 years of age since you have been on the bench? Do you know

of any juror that's ever been subpoenaed under the age of 21 years?

THE COURT: I can't recall. Well let's put it this way, I don't believe that there is anyone under the age of 21 in the list because of the statute. But I don't think there's any clear evidence one way or the other. I would say that it is doubtful that there were any.

MR. KIRSCH: Well the only way we can do it is to go by, unless Frank is willing to stipulate on it, I think it is clear that I can call every Circuit Court judge, and every Court of Record judge as a witness, and ask them if they require it within their original questioning, and I assume that same question is asked by every judge, and has been in the past, and whether or not they ever had any 18, 19 or 20 year olds appear in court as a juror.

MR. HAMILTON: Your Honor, the basis of the motion, as well as I understood it, was that there has been a systematic exclusion of people under the age of 21 on this particular jury list under which we're operating, and from which our panel was drawn. There has been no evidence there was any systematic exclusion.

I will agree with Dick that I have never had a jury trial, never heard a jury trial where the question was not [15] asked. You asked it this morning. But the fact that there was no one present under the age of 21 in the interrogation this morning does not mean that they have been systematically excluded. I don't think the motion should be granted because it is incumbent upon him to determine whether there has been any systematic exclusion, and there has been no determination of that.

THE COURT: I think you would have to call as witnesses the people who prepared or selected the list that is in the box from which these were selected.

MR. KIRSCH: They were the old Jury Commission as opposed to the new Jury Commission, I gather.

MR. FOX: There might be something down in the list they took away from us.

THE COURT: But even if that was established I would deny the motion because of the statute, and because I think that the state court has a right to determine what age jurors shall be. The constitutional amendment goes to voting, but I don't think it goes to qualifications to serve as a juror.

MR. KIRSCH: Will you stipulate that that's what they'd testify to?

MR. HAMILTON: What who would testify to?

MR. KIRSCH: The people that prepared the jury list.

MR. HAMILTON: I have no idea. I will not stipulate [16] to what they will testify to because I have no idea what they will testify to.

THE COURT: If you want to perfect your record by having one of your associates run this down while we're proceeding, fine.

MR. KIRSCH: If Frank will stipulate that I am not waiving it I'll be happy to do so. The rules seem to say that if you proceed with trial you waive your right to challenge the jury. I will be happy to go ahead and have subpoenas issued for the old Jury Commission and bring them in.

MR. HAMILTON: Whether the Court can rule that you are not prejudicing your position I don't know. I am not going to stipulate to it.

THE COURT: I gather you are saying you are not sure whether I can say well you can proceed without prejudice to your position?

MR. HAMILTON: I don't know whether you can or not.

MR. KIRSCH: Your Honor, for the record I would like the record to indicate that Your Honor did at the

beginning, when you were voir diring the jury, you did ask each and every one of them were they over the age of 21 years.

THE COURT: That is the first question on the form for qualification of the jury panel.

MR. KIRSCH: All right, sir. And all of the jurors present indicated they were over the age of 21 years, is that [17] correct?

THE COURT: That is correct.

MR. KIRSCH: May I ask Your Honor, sir, if somebody had said I am here, and I am 19, would Your Honor have excluded him from service on the jury by virtue of the statute?

THE COURT: Before or after you made the motion?

MR. KIRSCH: If no motion had been made.

THE COURT: If no motion had been made it wouldn't even have occurred to me not to exclude him, because the statute says over the age of 21.

MR. KIRSCH: For the record, sir, may I ask Your Honor how long you have been serving as a Circuit Court judge?

THE COURT: Since December of 1967.

MR. KIRSCH: Have you systematically in all jury trials asked the same question, are you over the age of 21?

THE COURT: I have.

MR. KIRSCH: And have you had any occasion, Your Honor, to have anyone appear in your court as a juror who was under the age of 21 to your knowledge?

THE COURT: Not that I can recall. And I have paid some attention to it also, because I had one trial in which there was a motion to strike the panel on the ground that there was a systematic exclusion of people 21, 22, 23 years old, and I have watched to see if these have in fact been included, and they have been.

[18] MR. KIRSCH: May I ask Your Honor, during the time you've served on the bench, approximately how many jurors have you had occasion to qualify?

THE COURT: Approximately 2880 jurors.

MR. KIRSCH: And to your knowledge all of those were 21 years of age or over?

THE COURT: Yes.

MR. KIRSCH: May I have just a couple of minutes?

THE COURT: Yes.

(Short recess.)

MR. KIRSCH: I'd like to offer the testimony of Judge James Minnet.

Would you state your name, please?

JUDGE MINNET: James F. Minnet, Circuit Judge, Broward County, Florida.

MR. KIRSCH: How long have you been a Circuit Judge in Broward County?

JUDGE MINNET: Six years and several months. Six and a half years.

MR. KIRSCH: Are you presently the presiding judge?

JUDGE MINNET: Yes.

MR. KIRSCH: Of this Circuit?

JUDGE MINNET: Yes.

MR. KIRSCH: Judge Minnet, did you have anything to do with the pulling of the present jury list?

[19] JUDGE MINNET: Well, the present jury list is made up of 106,600-some eligible jurors made up of registered voters of our County. You are talking about the present one?

MR. KIRSCH: Is that the one that is going into the computer?

JUDGE MINNET: Yes. That is going in the computer. Now the one prior to that was partially computerized. That is we used a system of cards to print a jury

list, venire, as each judge needed them, or as the Court of Record needed them.

MR. KIRSCH: Now this prior one that we're talking about, the juries we're using today—

JUDGE MINNET: Right. Apparently this is the last—

MR. KIRSCH: Is that right, Judge?

THE COURT: Yes, this jury list.

JUDGE MINNET: This will probably be the last.

THE COURT: It indicates it was one that you pulled on January 14th of this year.

JUDGE MINNET: Yes, right.

MR. KIRSCH: Now do you know, sir, whether or not 18, 19 and 20 year olds were included in that jury?

JUDGE MINNET: They were not included insofar as I know, I know they were not included. They're not included in the new master list of 106,000-some names.

MR. KIRSCH: Now during the little over six years that you've served on the bench, do you inquire of the jury as [20] to their qualifications, and is one of their qualifications that they be over the age of 21 years?

JUDGE MINNET: Yes, that's the very first question, and it usually raises a smile because most of the jurors are much older than 21. And, of course, I always say to them the Court will go right on to the next question, unless some of you raise a hand, and so it is one of those questions that we pose, of course, and I have yet to have an experience with someone saying yes, I am 20. I have never had it in my years on the bench.

MR. KIRSCH: Can you tell me approximately how many jurors you have qualified without finding one under 21?

JUDGE MINNET: It would have to be in the thousands, because—

MR. KIRSCH: Thank you, Judge.

MR. HAMILTON: You drew out the list January 14th?

JUDGE MINNET: Yes.

MR. HAMILTON: And you drew it from a list of how many names, 10,000?

JUDGE MINNET: I think it was, and I guess, I recall it was in the neighborhood of 10,000. It might have been 7500. It might have been 10,000. I cannot recall.

MR. HAMILTON: Who selected these 10,000-some names?

JUDGE MINNET: The Jury Commission.

MR. HAMILTON: Did you have anything to do with the [21] selection?

JUDGE MINNET: Well they, of course, certify to me, and it is a certification saying these men, these women, were taken from the jury, from the registered voter list, and they're made up of a random selection. Of course these are the ones of the available that are used. But I know as far as I am concerned it was their effort to come up with a cross-section of jurists, considering the town, and so forth.

For example, if the jury list would appear to come from all Lauderdale-By-The-Sea it wouldn't truly be a cross-section of our community. So in the absence of putting them all, as we now have, you have to make a judgment.

MR. HAMILTON: The reason for the question, Judge, is out of the 10,000 or so names that were selected by the Jury Commission, all you know is that they certified to you that these were qualified electors from Broward County, Florida?

JUDGE MINNET: Right. Right.

MR. HAMILTON: And that they were a cross-section?

JUDGE MINNET: They were a cross-section, and there was no effort to especially pick or choose them, or, greater than that, to exclude anyone. There was no effort to exclude. The effort was to make it as random and as cross-sectioned as they could.

MR. HAMILTON: All you can testify to is the certification of the Jury Commission that they're qualified [22] electors?

JUDGE MINNET: Right.

MR. HAMILTON: And nothing dealing with age?

JUDGE MINNET: No.

MR. HAMILTON: That is all.

MR. KIRSCH: You say there are no 18 year olds included in this new list that you drew?

JUDGE MINNET: Well, as far as I know, I mean, they should have told me, because as far as I knew they were not eligible under our constitution, under the laws of Florida. They might be eligible for other reasons, for voting, as we all know. But as far as I know they were not eligible because they hadn't met the minimum qualifications, to wit, 21 years, and that's been our law.

MR. KIRSCH: Thank you, Judge.

Now I can bring in all the judges, unless you're willing to stipulate that these judges are all going to say the same thing.

MR. HAMILTON: Well I won't stipulate they'll say exactly the same thing as Judge Minnet. I don't know whether they are qualified. I will stipulate that to my knowledge, and I feel reasonably certain that I think every judge that has ever tried a jury trial will say the first question is are you over the age of 21, and that they have very rarely, if ever, had anyone say no. If that's what you want me to stipulate to.

[23] MR. KIRSCH: They'll all say they have to be over 21, not that they have to be over 21, but that's

the question that they ask, and they do not get people on juries, called on jury duty that are under 21.

MR. HAMILTON: Fine. I will stipulate to the asking of the question and the nonresponse from the potential jurors.

MR. KIRSCH: All right.

THE COURT: Of course, what judges did in the past, I don't think would be pertinent. It would be from the effective date of the constitutional amendment.

MR. KIRSCH: That is correct.

THE COURT: Last fall.

Mr. Fox, can you tell us when this list was selected?

MR. FOX: You would have to get the third quarter, and it would be a certification that Judge Minnet made. We had to swear to it in front of him, and Beverly was there, and the other girl. And it would be right on the first page of the certification.

MR. HAMILTON: This would be the third quarter of last year?

MR. FOX: Yes, it would be. This is the list that you were talking about?

THE COURT: Sometime when then, in September or October?

MR. FOX: Probably September, sir. September or [24] October.

THE COURT: October would be the fourth quarter, wouldn't it?

MR. FOX: It would have to be the third quarter, because everything else I think is on the computer.

THE COURT: It would be July, August and September, sometime in that period?

MR. FOX: September.

THE COURT: Does anyone have any idea when the constitutional amendment became effective?

(Short recess.)

THE COURT: Let the record reflect that I have just spoken by telephone to Jane C. Carroll, the Supervisor of Elections, and counsel have agreed that without the necessity of calling her I may recite on the record what she told me. She said that when she prepared the list that was sent to the Jury Commission, from which this third quarter list was compiled, that persons under the age of 21, or over the age of 65 were not included, and were not on the list, or at least should not have been. She can't say that there might not have been a mistake and someone under 21 might have by mistake gotten on the list, but they had set their data processing so that it excluded those under 21 and over 65.

MR. HAMILTON: What was the date that she submitted them to the Jury Commission?

[25] MR. KIRSCH: Certified in September of '71.

THE COURT: She didn't tell me that.

MR. HAMILTON: Does she know the date they started taking 18 year olds to register to vote?

THE COURT: She started registering 18 year olds in November of 1970, when the books opened after that election. Initially it was only for the purpose of national elections, but they became qualified for all elections last July when the 26th Amendment was adopted.

MR. HAMILTON: And we do not know when the list submitted to the Jury Commission?

THE COURT: We do not know whether these were submitted before or after.

We have here the third quarter list of jurors, and the slips apparently from which it was compiled. Do you know when those slips were sent to the Jury Commission from Jane Carroll's office?

MR. FREEMAN: No, I don't know when it was sent to the Jury Commission. The only record I would have would show when the list provided by the Jury Commission

was filed with the Clerk, and the date the slips were actually placed in the box. That would not show in our certificate down in the Clerk's office.

THE COURT: Was it in September?

MR. FREEMAN: I couldn't tell you offhand, Judge. [26] I'd have to look at our records. I don't have the date in mind, Judge.

JUDGE MOORE: Is that the latest one?

MR. FOX: That's the third quarter.

MR. FREEMAN: How many names are on that one?

MR. FOX: This would be in September.

MR. KIRSCH: It wasn't September of '71.

MR. HAMILTON: That it was certified.

MR. FOX: It was certified in September.

MR. HAMILTON: We still don't know what point in time Jane Carroll gave the list to the Jury Commission.

THE COURT: I don't think really, does that make any difference? If 18 year olds are entitled to serve on juries by virtue of the 26th Amendment, then the panel is invalid, no matter when the list was sent up. I don't, it is my view that the 26th Amendment does not change the state law with respect to the qualifications of jurors.

MR. KIRSCH: All right. I think it is established for purposes of this hearing though that the list that was furnished to the Jury Commission excluded 18, 19, 20 year olds, and everyone over 65 years of age?

THE COURT: Let's put it this way, Jane Carroll says that that was the intent. She can't say that there wasn't a mistake made.

MR. KIRSCH: Yes. I am talking about as far as she [27] was concerned she excluded them when she sent the list over, people under 21 and over 65 were excluded from the jury list as far as the Supervisor of Elections would testify.

Do you agree that she would testify to that?

MR. HAMILTON: Oh, yes. That is what she would testify to, yes.

JUDGE MOORE: May I interject something? You have made a ruling with regard to the 18 year olds.

MR. KIRSCH: That's right.

JUDGE MOORE: But if she testified that that list also excludes those over 65, that law had been repealed at the time this venire was made, amended by 70-138, I think.

THE COURT: Do you feel that your record is perfected now?

MR. KIRSCH: My motion will include the fact that people under 21 have been systematically excluded, and people over 65 have been systematically excluded from the jury list of registered voters.

THE COURT: That motion is a horse of a different color.

MR. KIRSCH: Yes, sir. Now that you found out what she says. I'd like to know what other people, registered voters she excludes on her own.

THE COURT: She said that she excluded people who were not eligible under state law.

[28] MR. KIRSCH: Yes, sir, but I don't know who she's talking about. We do know she's talking about people under 21 and people over 65. It is her opinion they're not eligible, so she's excluded those registered voters from the jury list.

THE COURT: Don't you want to just perfect your record and make your point on the under 21, because I tell you, you are stopping the trial otherwise. If you object to the fact that there's nobody over 65 on the panel, I will have to grant your motion.

MR. HAMILTON: What's the effective date on the amendment?

THE COURT: Sometime in 1970. July 1, 1970—Hold on a second. July 1, 1970 was the effective date of the repeal.

JUDGE MOORE: That is 70-138.

MR. KIRSCH: What does that provide, just that attorneys are exempt?

* * * * * * *

MR. KIRSCH: Your Honor, the Plaintiff is going to insist upon his motion as made for this reason, sir: We have a 19 year old boy, and Your Honor may say well if there ain't people over 65 that's not going to affect this boy. I cannot say whether it would or would not, whether older people might be more sympathetic to a 19 year old boy or not. I do not know. And sympathy doesn't play any part in it anyhow. But [29] I think this Court has to grasp the bull by the horn, and the buck has got to stop somewhere.

And the reason I say that, sir, is this following week I have a lady who is 65 years old as a plaintiff in a case, and it is coming up for trial. I'm going to make the same motion in front of some other judge, and he's going to have to do something about it, because it is going to affect that 65 year old lady. She's 70, I think. It is going to affect her if they are systematically excluded from the jury.

So I just say to Your Honor that this is something that although Your Honor may say well, here we've got a 19 year old boy, how can he be prejudiced by the automatic or systematic exclusion of people over a certain age, and I do not know who else Jane Carroll on her own excludes.

THE COURT: It may be interesting to find out. Such as whether she excludes doctors and other people not permitted by the statute.

MR. KIRSCH: Right. But Your Honor can say I deny it and we go to trial, which is fine. Now this is a case that I am prepared to go to trial with, my witnesses are here, and what-have-you. But in looking at the merits I feel it is a situation that has to be decided, and should be decided at this point, because it is going to come up on every trial both on the third floor and the fourth floor until the situation is resolved. And there's not a trial being conducted that might [30] not be affected, or that's going to be conducted, that might not be affected by this situation. And I think clearly that the systematic exclusion of people over 65 years of age, and I reiterate, under 21, is unconstitutional, and is depriving these people of their right to be tried by any and all persons who might be registered voters in this county and state.

I hate to put the onus on Your Honor's back—

THE COURT: That's what they pay me for.

MR. KIRSCH: Let me say this, I don't think that this Court at this time should take the view that in this particular case because of the age of the Plaintiff that Plaintiff would not be prejudiced, because as I say this coming week I've got a plaintiff who is 65, 68, or something like that. I know she's an elderly woman. The same thing is going to come up again, and it could very well come up in front of Your Honor this week on other trials. But I think that the procedure down there has been wrong, I think this is violating the constitutional rights of all, of every party litigant in this county, whether they be criminal or civil. Now I know some judges seem to feel, well, if it is a civil case it doesn't matter too much. If it is a criminal case it does. But I think when you are talking about depriving a man of his liberty, or giving him a fine because he violated a criminal law he's entitled to certain rights, and I think by the same

token I think that somebody who has been injured and suffered [31] a severe injury, such as this boy with a leg off, is also entitled to his constitutional rights, and that's the point I am making, sir. I don't want to delay this any further, Your Honor. I am prepared to proceed if Your Honor denies my motion.

MR. HAMILTON: You have denied the motion on the 21 year olds, and based upon the statute, and now we're here on the over 65. I'll be the first to admit I am not an authority on it, and I checked what law I could find, and I don't know, but it appears to me that it has been held that systematic exclusion because of sex does not violate anyone's constitutional rights, and how it can be affected by over 65, how that can affect this case I don't know. I don't know what the answer is.

My one concern is that if Dick is right that when this case is over there's a distinct possibility we're going to have an appeal, and if he is right, we are going to have to try it again. I don't know whether he's right or not. I don't see how it could affect this trial with the over 65.

THE COURT: I would agree with you. I think where you were talking about a criminal matter rather than a civil matter that the right to be judged by a jury of your peers is a fundamental right that has been protected by the Supreme Court of the United States where they found prejudice to result. I cannot see how the prejudice would result in this [32] case, and also I consider the provisions of Section 40.01 of the statute that says that once the list is drawn and certified and approved any irregularity or defect will not affect the validity of the list.

MR. KIRSCH: Your Honor, may I interject something there? The Chairman of the Broward County Jury

Commission testified before Your Honor today. They are not aware, or made aware of the ages involved of the prospective jurors. They're handed a list of people who are qualified and registered to vote in this county, and there is only certain information on there, and very limited, and age is not one of them. They're talking about certifying a list by the Jury Commission based upon what they suppose is a complete and valid list supplied to them by the Registrar of Voting. Now certainly these people can't be deemed to have certified something, that it makes it correct when they didn't even know what the qualifications were, or whether these people met these qualifications. They just assumed that. And it's admitted I think here, the information you got from Jane Carroll is true, that these people, and I assume it is not going to be raised as to the fact that we did not have her here—

MR. HAMILTON: Oh, no. In fact, I told Judge Booher he could tell us what she told him and we could stipulate this is the way she'd testify.

[33] MR. KIRSCH: My only point is, Your Honor, when you say that a person charged under criminal law has more constitutional rights than a person who has been injured in their property, I think that's error.

THE COURT: I am saying the Supreme Court has gone further to protect them.

MR. KIRSCH: They may have. I don't think their rights are any different.

THE COURT: It is the distinction between error and error, whether it is harmful or harmless. The test in criminal matters is it has to be, you must establish that it is harmless beyond and to the exclusion of every reasonable doubt. There is no such burden in a civil case.

MR. KIRSCH: I am just saying to the Court, and I think, like I say, I think that somebody has got to do it, and I think it is going to come up in case after case until this thing—

THE COURT: If you had somebody 65 or over I would grant your motion without question.

MR. KIRSCH: My point is this, if you have a tainted jury, by tainted I mean where people have been systematically excluded, for example if you had excluded—

THE COURT: You are calling this jury tainted because of a change in the law in the systematic exclusion of people over 65, which was a matter of law prior to 1970.

[34] MR. KIRSCH: Well it isn't the law today, sir.

THE COURT: It is not the law today.

MR. KIRSCH: Let me say this—

THE COURT: I do not believe that it was the intent of the legislature to change that portion of the law. I think they just wanted to wipe out all exemptions from jury duty except for practicing lawyers, and they did so.

MR. KIRSCH: And there must have been a reason for it.

THE COURT: But the rule had been before that if you were over 65 you didn't have to serve unless you desired to do so, and you could request that your name be put on the list, and it would.

MR. KIRSCH: May I just point this out, and the reason I am arguing it, because I consider it very important.

THE COURT: You see, there is a distinction between the change in the law and, for example, the systematic exclusion of blacks when you have blacks being tried.

MR. KIRSCH: That's the whole point I am trying to make.

THE COURT: One is procedural and the other is substantive.

MR. KIRSCH: If you say that because we have a 19 year old boy he will not be affected by the fact that

65 or over are excluded, I say to Your Honor that I think a white [35] person can challenge the panel on the basis of blacks have been systematically excluded. He has to be tried by blacks as well as whites, and he may prefer to be tried by blacks. And if the blacks have been systematically excluded and the objection is raised, I suggest to Your Honor, I don't care whether it is a black that raises it or a white that raises it, it is still, if they have been systematically excluded, then the jury panel must be stricken, sir.

And I don't care, while you can say how can that affect a white person, and it is not a question of how it could, but if he raises it, and it is a fact, then his constitutional rights as far as getting a proper jury are concerned are violated. My concern is if you say if this were a 65 year old person that you would strike the panel, and I say to you, sir, that would be the same as saying if a black raised a question of discrimination in the selection of a jury that you would grant it, but if a white raised it you wouldn't. And I say that's not proper, sir. Either the jury is good or it is bad. And who objects to it, and why is not the question.

And I say if a 65 year old could object to it and get it granted, then a 60 year old could, and a 59 year old person could, right on down the line to infinite zero, because there is no distinction in the eyes of the law as to who makes the objection. The question in the law is, as Your Honor knows, [36] the old saying, justice is blind, we don't care who gets out there and makes that objection, there should be no distinction.

Now my point is that if this jury panel is not good, it is not good as to 19 year olds, and it would be not good as to 65 year olds. And what Your Honor is saying, if I try that case next week with the 65 year old as the plaintiff and make the same objection Your Honor would grant it. Believe me, sir—

THE COURT: Because then I could see the possibility of prejudice.

MR. KIRSCH: Well, sir, as I say, would you distinguish between a white making a discrimination objection on jury selection with regard to blacks, as to blacks making that objection? Either there is or isn't a proper procedure that has been followed.

THE COURT: The point is that we've got a Florida Statute that says that once the list is completed and approved, and certified that any errors or irregularities are waived.

MR. KIRSCH: Waived by whom?

THE COURT: By the statute. The statute says that no errors or irregularities will affect the validity of the list, and I say that provision of the statute can only be overcome when constitutional principles are involved.

MR. KIRSCH: When you exclude a class of people merely by virtue of age, without any other showing, contrary [37] to the statute, contrary to the statute, then you automatically say there's prejudice because nobody can waive that, statute or otherwise. Now certainly a plaintiff isn't waiving anything, and the whole purpose of a motion to challenge, because regardless of what the statute says about it, it cannot be certified by a jury commission consisting of two people who don't even know what the ages are that they are certifying and pulling. And that's the reason that we have the procedure of coming in and making the challenge. Otherwise what would be the purpose of it? If you waived it because it has been certified, there would be no purpose in having a challenge to the array. Like that judge in Miami the other day threw out 5,000 of them down there because they showed discrimination. Who waived it? Nobody had waived it. And they had been certified.

I say to Your Honor that I think this is a situation that has to be, I think we've got a bad jury list, I think

you've got a bad computer list, and I think it is going to be every case tried is going to have to be thrown out of here, or grounds for appeals are going to be set up. And I think it should be stopped or corrected now. Now I realize—

THE COURT: I can assure you that steps are under way right now to correct it.

MR. KIRSCH: Yes, sir, but what I am saying is you are tainting every trial that is being tried today and they're [38] going to be challenged. I might suggest that, there may be some attorneys that aren't going to challenge it, and they can try their cases, but I think it has to be corrected.

Your Honor, as I said, I am ready to go to trial. I am sure Your Honor knows I have no objections to going to trial because I've worked all weekend to go to trial, but I think—

THE COURT: Let's put it this way—

MR. KIRSCH: The more I think about it, the more I am convinced that there would be error.

THE COURT: If the list is improper and there is error, this is perfect case to find it out.

MR. KIRSCH: Yes, sir.

THE COURT: Because it is error whether a black man makes the objection or a white man makes the objection, or whether a 19 year old or a 65 year old, the line is drawn here.

I, frankly, in view of the statute can't see the prejudice, that there is prejudice by the greater weight of the evidence.

Are you willing to go to trial under these circumtances, Mr. Hamilton? The reason I ask this, this will be my ruling, but I could appreciate the fact that both of you might decline to go to trial because of the expense involved. This is going to be an expensive case to try.

[39] MR. HAMILTON: My concern about this, and I said a minute ago, Dick is much more learned in the law than I am in this field, and I had to get some books to find out where we stand, and I honestly, I don't know if prejudice is a factor or not. Now Dick's position is since July 1st, 1970 he's entitled to a jury list to be drawn from the qualified electors as prescribed by statute, and this includes everyone except practicing lawyers.

Now I want this case over and done with, but I am concerned that if it is over and done with, that if there is an appeal there might be something wrong here. I don't think there is, but this is not Hamilton on constitutional law, because I don't know anything about this. This is my interpretation about what they say. I don't see how one can attack the integrity of a jury panel because of an exclusion of a class, that even if they were here it would just be impossible for me to comprehend where it would affect the outcome of the case. And I found some old cases dealing with discrimination, systematic exclusion of women that a male defendant could not assert that this was a violation of his constitutional rights.

The systematic exclusion I think has become so important in recent years, the civil right problems, the ACLU, systematically excluding because of color.

THE COURT: Let's make it clear here, also, that [40] all people over 65 were not excluded. Those who requested the ability to serve were included.

MR. KIRSCH: By whom?

THE COURT: By Mrs. Carroll. The rule as applied prior to '70, the '70 amendment, and which she is applying now is that they are not put on the panel unless they request it. If they do, then they go on the panel.

MR. HAMILTON: So I understand you then, what Jane Carroll is saying is that she did not change the procedure that existed as of June 30th, '70?

THE COURT: That is correct.

MR. HAMILTON: She was utilizing the same procedure, so we cannot say that 65 and over were systematically excluded. They were unless they specifically requested to be put on.

THE COURT: That is correct.

MR. HAMILTON: I just don't think there's any basis.

MR. KIRSCH: I'm ready.

* * * * * * *

[41] CERTIFICATE

I HEREBY CERTIFY that the foregoing, pages 1 to and including 40, is a true and correct transcription of excerpts of my stenographic notes of testimony taken and proceedings had before the Honorable STEPHEN R. BOOHER, Presiding Judge, at Broward County Court House, Fort Lauderdale, Broward County, Florida, on the 7th day of March, 1972, commencing at 9:00 o'clock A.M.

IN WITNESS WHEREOF I have hereunto affixed my hand this 9th day of May, 1972.

/s/ Edward Gilbert
Certified Shorthand Reporter

IN THE
CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA.

CIVIL ACTION

No. 71-2845 - Booher

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually,

Plaintiffs,

vs.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN,

Defendants.

Fort Lauderdale, Florida
April 13, 1972
2:50 o'clock P. M.

APPEARANCES:

KIRSCH, DRUCK & MILLS, P.A., by RICHARD R. KIRSCH, ESQ., and T. N. MURPHY, JR., ESQ., of Counsel, Appearing on behalf of the Plaintiffs.

FLEMING, O'BRYAN & FLEMING, ESQS., by FRANK M. HAMILTON, ESQ., THOMAS B. MIMMS, JR., ESQ., and FRANK MALONEY, ESQ., of Counsel, Appearing on behalf of the Defendants.

TRANSCRIPT OF PROCEEDINGS

The above-styled cause came on for hearing in Chambers before the Honorable Stephen R. Booher, Presiding Judge, at Broward County Court House, Fort Lauderdale,

Broward County, Florida, on the 13th day of April, 1972, commencing at 2:50 o'clock P. M.

[2] Thereupon:

The following proceedings were had:

MR. KIRSCH: Your Honor, if you recall, at the beginning of this trial and before the selection of the jury we filed a motion to quash the panel. That motion, which was amended at the hearing, was based on two grounds: One, that the—all persons between the ages of 18 and 21 years have been systematically excluded from the jury list and, secondly, that all the persons over the age of 65 have been systematically excluded from the jury list. I think that's without dispute.

MR. HAMILTON: It was amended to include over 65 after Judge Booher's conference with Jane Carroll.

THE COURT: I don't believe that's quite correct.

MR. KIRSCH: All right, you tell me what's incorrect.

THE COURT: At least, that's not factually the statement that Mrs. Carroll told me. She was proceeding by the old law. People over the age were not systematically excluded. They were excluded, but could serve if they offered or requested to do so—

MR. KIRSCH: All right, sir.

THE COURT: —and there were people in the panel over the age of 65 as witnessed by the fact that one of the jurors who was excused was over the age of 65.

MR. KIRSCH: All right, sir. Now—All right, sir. [3] It was agreed or stipulated between Mr. Hamilton and myself that as opposed to having Mrs. Carroll come up and testify at the hearing, that Your Honor could talk to her on the telephone and ask her these questions.

It is my understanding that from your conversation it was agreed that all persons between the ages of 18 and 21 were automatically excluded from the jury list—

THE COURT: Well, now—

MR. KIRSCH: —were not included.

THE COURT: —when you say between, it was people 18, 19 and 20—

MR. KIRSCH: Yes, sir.

THE COURT: —who were excluded.

MR. KIRSCH: I don't mean the 21-year-olds.

THE COURT: Between 18 and 21 is 19 and 20.

MR. KIRSCH: However you want to—I think we understand—

THE COURT: Yes.

MR. KIRSCH: —what I'm talking about.

It was also my understanding, Your Honor, that you were informed by the Supervisor of Elections, Mrs. Carroll, that only those persons 65 years or older were included on the jury list if they made a formal request to be included on that list; otherwise, they were not included, is that correct, sir?

THE COURT: That is correct.

[4] MR. KIRSCH: And it is my understanding, sir, for that purpose that Mr. Hamilton and I stipulated that your conversation to that effect would stand as the facts of the case as opposed to bringing her in and having her testify to that. Now, if that's not so, I've got her here to testify.

MR. HAMILTON: No, we—I remember this: that you asked us specifically if we wanted to bring Jane Carroll up to testify as to what she had told you on the telephone and I remember saying that I would stipulate with Dick that you could tell us what she said on the telephone rather than bring her in.

MR. KIRSCH: And that would be the evidence in the case.

MR. HAMILTON: Right. Right. Now, what she said, that it would be the same thing as if she testified.

MR. KIRSCH: All right. Correct me if I'm wrong, Judge. Her conversation with you was to the effect that 18, 19 and 20-year-olds were not included on the jury list—

THE COURT: That's correct.

MR. KIRSCH: —and that only the—those persons 65 years of age or older—

THE COURT: I think it was over 65. I may be wrong on that.

MR. KIRSCH: She went by the statute, which is 65—

MR. HAMILTON: Over 65.

MR. KIRSCH: Over 65; 40.08, sir; 40.08; whatever [5] that said before amendment; more than 65 years. Okay, over 65; only those persons who were over 65 were included on the list submitted to the Jury Commission who had made a formal request to be included on the jury list similar to the situation that we had with women who wanted to serve on jury lists prior to the '70 amendment. Is that correct, sir?

THE COURT: That's correct.

MR. KIRSCH: So that I assume then, you agree that this is what she told the Judge and what she would have testified to had she been here which we stipulated to?

MR. HAMILTON: Whatever was on the record that Ed took is what I stipulated to. I'll be honest with you. It was my understanding—and this was February the 7th; this was two months ago—but the way I recall it and I was looking to see if I had any notes on it, but my recollection was that Judge Booher told us that Jane Carroll told him that she was systematically excluding people under the age of 21 and over the age of 65. Now, that's the way I—but whatever the record shows is whatever I think—

THE COURT: Well, you will recall that one of the jurors who was stricken—

MR. HAMILTON: Yes, sir, Mr. Nathan.

MR. KIRSCH: He's here to testify; and it is my understanding that she did say if he came in and filed a formal request such as women used to do, that she would put [6] him on the list, is that correct, sir?

THE COURT: That was my understanding, but here again I don't have any notes on it here.

MR. KIRSCH: Well, if there is any question about it, she's under subpoena.

MR. HAMILTON: Well, whatever she told Judge Booher is what was in the record, which we agreed would be her testimony had she come to appear. Now, I'm not being picky, Judge. I frankly recall it one way, Judge Booher recalls it another way, but Ed Gilbert would have the notes, whatever it was.

MR. KIRSCH: Well, that's the only problem that I have, Frank. We don't have it and there was a lot of on-the-record and off-the-record at that particular hearing for some reason, if you remember, Judge; and if there is any question about it, it would either be one of two things: that she either told you she systematically excluded everyone over 65 or—and I don't think it really makes any difference if they were over 65; they could make a formal request and get on the jury list. So it would be either one of those two.

MR. HAMILTON: I agree with you.

MR. KIRSCH: All right, and, secondly, we did have the Chairman of the Jury Commission, Mr. Sidney Fox, here, who said that their lists that they made up were taken from the lists furnished to them by Jane Carroll, Supervisor of [7] Elections.

THE COURT: That's correct.

MR. KIRSCH: That's correct.

THE COURT: Can I tell Mrs. Carroll that she need not appear?

MR. KIRSCH: At this point, yes, sir. I don't want to excuse her—

MR. HAMILTON: Just a second. Just a second. My evil genius wanted her to testify. I did not have her under subpoena. So I did not have any authority to bring her up here.

MR. KIRSCH: Your Honor, at this juncture you may recall that during the voir dire of the jury that as each juror who appeared to be maybe 65 or older was called into the jury box that Your Honor asked them their age and that one juror, a Mr. Nathan, upon being asked his age, stated he was 70 years of age. Does Your Honor recall this?

THE COURT: Humn-humn.

MR. KIRSCH: At this point, if the Court please, I have Mr. Nathan under subpoena and I'd like to have him testify as to the procedure that he had to go through in order to be called as a juror.

THE COURT: Very well, if you will, call him.

MR. HAMILTON: I'm going to object to the proceeding because I don't think—I don't think it's proper, but I [8] don't know anything more to say than that. I'm preserving my objection.

MR. KIRSCH: Yes, sir.

Would you be sworn, sir?

Thereupon:

MURRAY NATHAN

was called as a witness on behalf of the Plaintiffs, and being first duly sworn, was examined and testified on his oath as follows:

MR. HAMILTON: Judge, just for the record, I'm objecting to any testimony being taken on the motion for a new trial.

MR. KIRSCH: If the Court please, the rule specifically says that the Court can take testimony on a motion for a new trial.

MR HAMILTON: I don't know whether along this line, but I just want my objection noted.

MR. KIRSCH: At least, that's my understanding of it.

THE COURT: The rule says on a motion for a rehearing of matters heard without a jury including summary judgment, the Court may open the judgment if one has been entered, take additional testimony and enter a new judgment. That's not really what you are asking for here.

MR. KIRSCH: Do you have a motion for a new trial?

[9] THE COURT: It's silent on it. Because of the uniqueness of the point involved, I think that testimony is appropriate. So your objection is noted, but overruled.

DIRECT EXAMINATION

Q. (By Mr. Kirsch) State your name, please, sir. A. Murray Nathan.

Q. Where do you reside, Mr. Nathan? A. 330 Southeast 2nd Street.

Q. In what city and state, sir? A. Hallandale, Florida.

Q. How long have you resided in Broward County, Florida, sir? A. Well, it's almost three years; two years, eight, nine months.

Q. At this same address? A. Yes, sir.

Q. Are you registered to vote in the State of Florida? A. Yes, sir.

Q. And do you recall approximately when you registered, sir? A. Oh, I think I was here a little over a year when I registered.

Q. Would that be sometime in 1970? A. Yes. Yes, the latter part of '70.

[10] Q. Do you happen to have your voter's registration— A. Yes.

Q. —certificate with you? A. I should.

MR. KIRSCH: Let the record reflect I'm exhibiting it to the Court.

THE COURT: Let the record reflect that the witness has presented Broward County voter registration card Number 3406891, issued November the 13th, 1970, Precinct 89A, to Murray Nathan, Apartment 104F, 330 Southeast 2nd Street, Hallandale, Florida.

THE WITNESS: I didn't sign it?

MR. HAMILTON: May I see it?

THE WITNESS: I'm sorry.

Q. Mr. Nathan, what is your birth date, sir? A. April 27th, 1902.

Q. Now, sir, are you the same Murray Nathan who was called for jury duty at the Broward County Court House in Judge Booher's court room, 481— A. Yes, sir.

Q. —during the week of February 7th, 1972? A. Yes.

Q. Do you recall being called into the jury box and the Judge asking your age? [11] A. I didn't know whether the Judge asked me or one of the lawyers, whether it was you—I think it was you that asked me. I don't think the Judge asked me my age.

Q. All right, but you were— A. Now I may be wrong, excuse me, but I'm just telling my recollection.

Q. All right, sir. You do recall being called into the jury box— A. Yes.

Q. —and subsequently excused? A. Right.

Q. All right, sir. Now, sir, prior to February 7th, 1972, had you ever been called for jury duty in Broward County, Florida? A. No.

Q. All right, sir. Did you, sir, take any affirmative action to get on jury duty? A. I sure did because,

truthfully, I wanted to do my civic duty. Now, I was retired and I had time. So I got an application and I filled it out and I sent it in. In about six or seven months later I got that letter to appear in Court, in Judge Booher's Court.

Q. All right, and what kind of—Do you recall what kind of application this was, Mr. Nathan? A. No. It was just a question of—It was a [12] card. I think it was two cards that I had to fill out and send to registration of jurors or something.

Q. Supervisor of— A. Supervisor, right; and then all of a sudden I got the notice to appear in Court and I was very happy about it.

Q. All right, sir. A. I was doing something and then, lo and behold, I was off.

Q. Do you recall how you happened to get this application? A. Through a friend of mine who lives in the building and he's—he was at that time; he's since passed away—treasurer of the condominium association and we were discussing it one night and I said, "I'd like to join and do my duty and be a juror." He said, "Well, I'll get you an application. You can send it and let's wait and see," and that's just what happened.

MR KIRSCH: Okay, sir.

You may inquire.

CROSS EXAMINATION

Q. (By Mr. Hamilton) This trial commenced on February the 7th, 1972. That's the time that you came up here; you were served with a subpoena— A. That's right.

[13] Q. —to appear? A. Monday to Thursday, I think it said.

Q. You were served with a subpoena and pursuant to the subpoena you came into Judge Booher's court room? A. Right.

Q. And you are the one, Mr. Nathan, who subsequently went into the box and was subsequently excused? A. Right.

MR. HAMILTON: That's all.

MR. KIRSCH: Thank you, Mr. Nathan—

THE WITNESS: That's all?

MR. KIRSCH: —appreciate your coming.

THE WITNESS: You don't need me any more?

MR. KIRSCH: No, sir. Thank you for your time. I assume we're going to need Jane Carroll.

MR. HAMILTON: No, I've given up. I don't care. I didn't want her in the first place, but I defer to the brains in my firm.

MR. KIRSCH: Well, let's get down to what we agree to. We agreed—We do agree that the Jury Commission gets a list from her—

MR. HAMILTON: Sure.

MR. KIRSCH: —of the—pursuant to the statute of 10,000 voters or whatever it is—

MR. HAMILTON: Right.

[14] MR. KIRSCH: —and that unless formally requested, people over 65 years of age are excluded?

MR. HAMILTON: Isn't that what you said earlier?

MR. KIRSCH: Yes. I just want to know if that's what we're agreeing on now because you wanted to call her.

MR. HAMILTON: I think that's what we agreed on earlier—

MR. KIRSCH: Okay.

MR. HAMILTON: —and that's what this man said. All he had to do to serve was fill out an application and he did. That's all right with me. We're not going to take five days to hear this motion for a new trial, are we?

MR. KIRSCH: No, I just want it understood, Your Honor, if it isn't clear in the record that it must be a formal request made before they serve.

THE COURT: I think it is clear three times.

MR. KIRSCH: Okay, sir. Thank you.

Shall we then get down to the law?

THE COURT: Yes.

MR. KIRSCH: Your Honor, our motion for a new trial deals with several grounds, one of which is the systematic exclusion of all persons over age 65 from jury duty in Broward County, Florida, at the time this case was tried. You may recall that Mr. Fox stated that this panel was drawn from a jury list which he had here at the Court and I think [15] we've even checked to make sure we had the right one because we found one of the jurors on that particular list, if Your Honor recalls—

THE COURT: Yes.

MR. KIRSCH: —so that we know that this particular jury list was—panel was drawn from a list supplied by Miss Carroll at some prior date during the year 1970. I think he said during September or October of '71, which was subsequent to the enactment of the amendment to 40.08, which did away with all the exemptions except for lawyers.

Now, to go back, sir, just briefly, 40.08 prior to the '70 amendment provided for the exemption of various and sundry type people in various occupations and provided that—in Section (1) thereof that all persons more than 65 years of age and all persons subject to any bodily infirmity amounting to disability should be exempt.

Now, even if she were following 40.08 prior to its amendment—I'm speaking of she; I'm talking about Jane Carroll—she didn't do it properly because 40.12, as it then existed, provided that all these people who are named in 40.08 in order to be exempt, had to file annually on

and before the 31st day of December each year with the Clerk of the Circuit Court an affidavit claiming exemption from jury duty, stating the grounds therefor and if they failed to file this affidavit of exemption, they were no longer exempt; [16] their exemption status was waived.

So it wasn't an automatic exemption such as with women. The people even under the old statute, people over 65 years of age, in order to be exempt, had to come in and request the exemption and there are cases which say this exemption, of course, is personal to the individual jurors or prospective jurors.

Now, 40.08, of course, was amended in 1970 and did away with the exemption of people over 65 years of age and again, however, said that you still—the only ones that are exempt are attorneys and they still have to come in on the—and file and request their exemption because in 40.10 under the new statute now it says the Jury Commissioners in counties described in Section 40.09 shall select a list not more than 10,000 inhabitants of such county known to be qualified under the law to be jurors; even if exempt, have to file a written claim of exemption from jury duty.

So prior to 1970, of course, or prior to the time when they amended the statute to allow women to serve as jurors without exemption, there was no such thing as an absolute exemption other than for women.

Now, there is no absolute exemption at all for anyone other than lawyers who have—and they're not absolute; they still have to claim their exemption under that particular [17] section, although 40.12 has now been repealed. But what do we have here, Your Honor? We have an exclusion of a class of people on a large percentage of the population of Broward County, Florida, because we have a large retirement community of them in Broward County, Florida, who have been systematically excluded

from serving on our juries by the mere fact that our Supervisor of Elections has systematically excluded them from the list furnished to the Jury Commission from which they are to prepare and draw their jury venire.

Now, as Mr. Fox stated when he was—You may recall. All he did was get this list from Jane Carroll and they went down and picked out so many names. Jane Carroll said, "I didn't include anyone over 65 years of age unless they came in and filed and requested formally to be included on that list, which, of course, is contrary, completely contrary to the statute as it existed before 1970 and contrary to the statute as it existed since July 1st, 1970, completely contrary to the statute.

What she did was, she took people over 65 and I assume you could take all—if she followed 40.08, she probably excluded under the old 40.08 firemen, attorneys, doctors and what-have-you, pharmacists, ministers and everything else—everybody else; but what she did, Your Honor, she treated people over 65 years of age the same as they used to treat women, according to what she told you; [18] made them come in, file a formal request to be put on the list; otherwise, they were automatically and systematically excluded.

Now, sir, the law of Florida and the federal cases are all clear. Of course, most of this has come up, as Your Honor is well aware, in the race issue. However, this is not the only type of exclusion that has been considered to be error and I refer the Court to the case of Simmons—S-i-m-m-o-n-s—versus State of Florida, District Court of Appeal, First District, February 8th, 1966.

THE COURT: What's the citation?

MR. KIRSCH: I'll give you a copy of this.

MR. HAMILTON: Could I have the citation?

MR. KIRSCH: Yes, sir, it's 182 So. 2d 442.

THE COURT: 82 or 92?

MR. KIRSCH: 182, sir. In this case, Your Honor, the—This was a rape case and the Supervisor of Registration in this particular county, which was Alachua County—that they—Well, let me just read the questions and answers that came in. It says: "This witness also testified positively that the jury commission made no distinction between white and negro in the process of preparing a master jury list. The following series of questions and answers upon the examination of this witness is critical to our consideration of whether a 'class' [19] of persons was unlawfully excluded from the master list of jurors:"

Then the question: "On what qualifications do you determine whether or not a person is placed on the jury list? A. The vast majority of it is instinct. The law spells out fairly clearly what we must look for in terms of a good juror. However, when we eliminate all of those who are disqualified for any reason or another and then we ultimately get down to who shall serve and who shall not serve, we just try to use our good judgment on that particular score.

"Q. Are there any particular classes of persons who are not placed on the jury list? A. Classes, I think perhaps about the only one that we would not put on a jury list might be common laborers, someone whose employment or whose occupation is shown as common laborer. We will on occasion put truck drivers on, but there's no—I think that we have others—if we're looking for two hundred names, for example, and we have those who are not truck drivers we would use them rather than truck drivers.

"Q. So as a class generally common laborers [20] would not be placed on the jury list? A. I think that's a safe assumption.

"Q. Now, other than as a class are negroes excluded from the jury list? A. Not at all.

"Q. Unless they would fall into the class of common laborer? A. Yes, I think that is probably so. There might even be exceptions to that."

And, of course, there was further testimony taken and they said there was no distinction between white and colored. The sole issue then here was the exclusion of a class known as common laborer. The Court said: "It is crystal clear that in making up the jury list there was an intentional and systematic exclusion of common laborers as a class. The prohibition against such action is clearly explored in Porter v. State, 160 So. 2d 104. . ., in which Mr. Justice O'Connell, speaking for the Florida Supreme Court, recognized the rule that discrimination in the selection of juries because of race, class or color is violative of the Federal constitution."

The Court went on also to say that in: ". . . Thiel v. Southern Pacific Co., 328 U.S. 217, 63 S. Ct. 984, 90 L. Ed. 1181, 166 A.L.R. 1412 (1946), dealing with [21] a situation where laborers working for daily wages were deliberately excluded from jury service, in which the court said:

'Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.' "

And they then because of that one ground, sir—they said: "For the reasons stated, it was error to deny defendant's motion to quash the jury panel and so the judgment appealed must be and it is

"Reversed."

You recall, Your Honor, about the same time that we had a hearing before this Court on our motion to

quash there was a case from Dade County that was certified by Judge Friedman to the Supreme Court and one of the questions, of course, was the question of 18-year-olds, so forth serving, which the Supreme Court said they weren't entitled to—the Supreme Court of Florida; the state had the right to make its own rules as to qualifications of jurors.

THE COURT: It seems I said much the same sort of [22] thing in response to your motion.

MR. KIRSCH: Right, sir, but they also had as one of the grounds the question of random selection of jurors throughout the county. It seems down in Dade in an effort to try to get a representative proportion of females to males and blacks to whites that they had said, "Okay, we've got X number of Negroes in Dade County and therefore out of every thousand people drawn, if we've got 15 percent of the population are Negores, we're going to say 15 percent on jury panels; and since we've got about an equal number of females and males, we're going to see that there is an equal number of men and women on the jury panels," and the Court held that this was improper and that the motion to quash the grand jury should have been granted. They said that by trying to say you have to have 15 percent, for example, of blacks on a jury, there is no random selection. It may—On one jury panel you may be to zero and another you may get 50 percent, but it's a random selection.

Of course, they now say the answer will be the computer system, which I assume might be the answer, but I call the Court's attention to the statement by the Supreme Court because we are in a civil case and there may be some question in the Court's mind as to whether or not the same rules will apply in civil cases as they do in criminal cases.

[23] THE COURT: I was just going to ask that.

MR. KIRSCH: And I would like to read from Page 9 of their decision or their opinion, rather, sir.

THE COURT: Has this been reported yet?

MR. MIMMS: No, sir, it has not. The opinion was filed on February 22 and rehearing was denied on April 3rd and it hasn't had an opportunity to be reported yet, sir. Does Your Honor have a copy? We have an extra copy.

THE COURT: I would very much like to have it.

MR. KIRSCH: I refer Your Honor—

MR. HAMILTON: We'll give you the one that's not marked.

MR. KIRSCH: —where it says here—This, I think, would be the more—"The tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."

Now, they make no distinction, Your Honor, between civil and criminal. Now, it says: "This does not mean, however, that every jury must contain representatives of all the economic, social, racial, political and geographical groups of the community, for such complete representation would frequently be impossible. But it does mean that prospective jurors must be [24] *selected at random* by the proper selecting officials without systematic and intentional exclusion of any of these groups."

Now, "Jury competence is an individual rather than a group or class matter," it says. I think that is particularly important, Your Honor, since I believe this is something that you did mention or one of the matters that you did mention at the hearing on our motion and, as you note here, when they wrote this opinion, they specifically said criminal or civil and I submit to Your Honor that a man can be just as damaged by a partial or tainted jury in a civil case that can affect his life just as much as it

can in a criminal case. Many times we're dealing with a criminal case that might be just a misdemeanor where the most the man is going to get is a couple of months in jail and yet in a civil case we might be affecting this man's complete life in the future. So I don't think it makes any difference if a jury is tainted as this jury was tainted; then without question, sir, whether it's civil or criminal should make no difference and without question that jury should be discharged and the failure to do so, I believe, is error. They go on to say at Page 15, sir: "In other words, prospective jurors must be selected at random by the proper selecting officials without systematic and intentional exclusion of any economic, social, [25] religious, racial, political, or geographical group."

THE COURT: What page are you on?

MR. KIRSCH: Fifteen, sir. Right down middle ways after they say: "We summarize—"

THE COURT: They've got it marked.

MR. HAMILTON: We gave him a marked one.

MR. KIRSCH: There are a number of other cases, Your Honor, and I'll merely cite them to you rather than—because they all say the same thing, that systematic exclusion of a class of persons is denial of due process.

In Willie Carter, et al. vs. Jury Commission of Greene County—I'll have to get that citation, but it says United States of America versus William C. Brickey—

MR. HAMILTON: Versus who?

MR. KIRSCH: Brickey, B-r-i-c-k-e-y, 426 Federal Reporter, 2nd Series, 680—

THE COURT: Can you give me that again, 4—

MR. KIRSCH: —26 Federal Reporter, 2nd, 680.

MR. MURPHY: Your Honor, Carter against Jury Commission is 90 Supreme Court 518.

MR. KIRSCH: In this United States versus Brickey, Your Honor, it says—and this is the same rule that is

set out in just about every case—the Constitution requires jury selection systems to draw their jurors from a fair cross section of the community. This does not mean that every class [26] or subclass is identifiable or identifiable group must be represented on every jury list, but does mean that there must not be any systematic, intentional or negligent exclusion of persons or groups.

In Simmons versus United States, which really isn't applicable here because it deals with exclusion of Negroes—and that's 406 Federal 2d 556, but, of course, they say—the law is the same, that the exclusion of any groups who are entitled to serve taints the jury.

Now, I don't think there is any question—If there is any question in the Court's mind that these people were excluded, I would like—if that is going to be an issue in this case, I want to call in Jane Carroll. From my understanding of our stipulation, that is not an issue.

THE COURT: That is not an issue.

MR. KIRSCH: But there can be no question in this case that she did not follow 40.08 as amended in '70 nor did she follow it as, you know, it even existed prior to the amendment.

Now, I have one other witness and it's Judge Minnet, he being the presiding Judge who presided over the—The purpose of his testimony is to show, sir, that at the—as a result of the motion to quash filed in this case, he as presiding Judge and the Jury Commission put in some 75,000 names in the computer in order to correct this error and that [27] 75,000 names were of people of 65 and over.

THE COURT: There were 106,000 and 76,000 more were put in—

MR. KIRSCH: Right, sir.

THE COURT: —and we are having all sorts of grief.

MR. KIRSCH: I know, but that's the legislature's problem, not ours.

I would like to put his testimony in the record, if I may, sir.

MR. HAMILTON: I'm still objecting to any testimony.

MR. KIRSCH: Judge Minnet said he will be here in about three or four minutes or so. If you prefer to go ahead with their argument, why, we can do that or however you want to handle it, Judge.

THE COURT: Let's do it in orderly fashion.

MR. KIRSCH: Okay, sir.

MR. HAMILTON: You are not going to argue anything else?

(Whereupon, Mr. Kirsch shook his head.)

MR. HAMILTON: I don't know what Judge Minnet is going to say. I assume he's going to say what Dick says, something about adding a list to the jurors. I don't think that has any place at all in determining whether this jury was tainted. Since I don't think it was tainted, I don't think it has anything to do to determine whether or not they're [28] entitled to a new trial because of this and again I'll object to it.

THE COURT: Again, this goes to the condition. You repaired the condition after the accident.

MR. KIRSCH: No, it does not, sir. The reason it is material is it shows the number of people—

THE COURT: It shows the extent of the class that was excluded.

MR. KIRSCH: Yes, sir.

THE COURT: You may have a good point.

(Whereupon, Judge James F. Minnet entered the hearing room.)

THE COURT: You are an attorney, a member of the bar, a conservator of the peace under the Constitution—

JUDGE MINNET: Yes, sir.

THE COURT: —so I really don't think it is necessary to swear you in unless you have no objection.

JUDGE MINNET: I have no objection.

Thereupon:

JUDGE JAMES F. MINNET

was called as a witness on behalf of the Plaintiffs, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Kirsch) Would you state your name, [29] please? A. My name is James F. Minnet. I'm a Circuit Court Judge, Broward County, Florida, 17th Judicial Circuit.

Q. Are you presently presiding Judge in this Circuit, sir? A. Yes, I am and I was the presiding Judge at the time that we handled the jurors in connection with the work of the Court.

May I say I was aware that there was a hearing and I was aware that I would be called, but to refresh my memory, I obtained the certifications of persons to serve as jurors. May I say on February 3rd of 1972 I prepared the list of jurors to serve in our Court and we were using, of course, the computer type of service at or about that time, I believe, this trial was under way. I'm not—

MR. HAMILTON: February 7th when—

THE WITNESS: Right.

A. (continuing) Well, later on you will learn what next happened.

Q. All right, sir. When you say computer type service, this was not names in the computer itself at the

time? A. No, it was a procedure. We're talking about procedures—

Q. All right, sir. A. —making—getting jurors to our courthouse.

[30] Q. All right, sir. Now, could you tell me, sir, how long you have been the presiding Judge of this Circuit? A. Since, oh, October of 1971.

Q. Now, you may recall, Judge Minnet, the hearing that was held on the morning of February 7th, 1972 and, in fact, you were called to testify at that hearing? A. Right.

Q. Now, Judge Minnet, prior to that hearing were you aware of the fact that persons over 65 years of age were not included on the jury list? A. No, I was not aware of it. In fact, at that time we became aware that persons over 65 were—were not within the so-called file that we had and this is a list on a disc which includes all the names of all available jurors; at least, it was—to my understanding, they were not there. I didn't know why.

Q. All right, sir. A. Well, to continue anyway, to make it easy, at that time, which was the 7th, it was called to my attention and immediately I asked for jurors in the over-65-age bracket; and on February 3rd we had a hundred—I'm trying to get the figures anyway—106,000; I think from them we went up—we drew 70,000 more jurors of the over-65 bracket.

Q. As I understand it then, sir, on February 3rd, 1972, there was a list of 106,000 persons available for jury [31] service? A. Yes, and then we increased it to 176,000, which was about 70,000 more of jurors over the age of 65.

Q. And that was done when it came to your attention on February 7th? A. Yes, we moved immediately, the time it took to put those jurors into the electronic processing data device. We did it immediately.

Q. In other words, seventy some thousand people were added to the jury list— A. Right.

Q. —and they were all over 65 years of age? A. Yes. I can't tell you why except when it came to our attention we acted immediately.

Q. All right, sir. A. Apparently what had been happening—and again I'm not criticizing anyone because I really don't know—they were waiting for the over-65 jurors to ask rather than put them in and let them get excused by the Court or by the attorneys. After all, the attorneys excuse jurors for no reason. We usually have a reason.

Q. All right, sir. As I understand it, now the jury list— A. Oh, yes, now the jury list is all—We can tell you of our experience; we excuse jurors all the time.

[32] MR. KIRSCH: Thank you, sir.

CROSS EXAMINATION

Q. (By Mr. Hamilton) Judge Minnet, that last comment that you excuse jurors all the time, I think I know what you meant, but subsequent to the addition of the over-65—you had jury trials since this time? A. Oh, yes.

Q. And what did you mean, "We excuse them"? A. Oh, they call up and say, "Judge, I'm 76. I'm sick. I'm in a rest home," and then we say, "Do you not want to serve?" and usually we excuse them. That's what I meant. I didn't mean anything—

Q. No. No, I know what you mean by because of the age limit. If they call and ask to be excused, you know, you will excuse them? A. Yes, sir.

MR. HAMILTON: Fine. That's all.

REDIRECT EXAMINATION

Q. (By Mr. Kirsch) That is if they're—because of physical or mental problems that they can't serve? A. Yes, usually that's what they say. They say, "Judge, I'm over 65. I don't feel good," or whatever they will say and then we, of course, excuse them.

Q. All right, sir. A. I don't know what Judge Booher's experience [33] with it—I assume it's been like mine. We don't wrestle with an excuse. We just accept it.

Q. That would apply to anyone of any age if they were sick or infirm? A. Right.

MR. KIRSCH: Thank you, sir.

RECROSS EXAMINATION

Q. (By Mr. Hamilton) When someone calls in as opposed to being—as appearing, you know, Monday morning for docket sounding and asks to be excused for health reasons exclusively because of age, do you normally accept their word? A. No. No, it's usually a letter from a doctor. It has to be a follow-up confirmation that this is the reason and if they're in a rest home or something like that, usually a rest home will send a letter to my secretary confirming it. We do not accept telephone calls. That's just the initial visit—the initial contact by the Court with the person. We try our best to keep the system pure.

All I was telling you—it's amazing how many we have to excuse, but eventually, of course, they're called and eventually they're excused; and, on the other hand, many of them want to serve.

MR. HAMILTON: That's all.

THE COURT: I wonder if I may ask a question.

THE WITNESS: Yes, sir.

[34] EXAMINATION

Q. (By the Court) When did we convert to the computer? A. The—We had been in a modified conversion, Judge. I can't give you the exact date, of course. As you know, we got a professional from the Supreme Court. We had a modified version of selection of jurors. We went to a complete data processing. I will have to—I know it became effective the first of the year, the first of '72. That was the target date. My guess is that we had modified use of it, I would say, at least a year before that, at least. We had a modified use where we were using punch cards and—instead of using the disc.

Q. But the punch cards didn't—were just selection of jurors and did not include every eligible juror? A. No, it did not.

Q. Now, is it not true that except in criminal cases and except for certain judges of whom I am not one, you select all the jurors? A. Yes. Yes. There were only a few judges who elected to use the slip method; you know, put the slip in a box, unfold it, read it, write it down in contrast—Have any of you seen how we do it or did? We had a big box, but the box got so heavy, it took a truck to carry it; but the punch cards on them—all the cards had were punch holes [35] in them. So, obviously, it was blind.

Q. If this trial was held and the jury was summoned for February the 7th, can you tell me when you would have drawn that jury? A. It's always a month ahead. We could not—We can't get the time every month. I think it's a Thursday now and I can't give the exact Thursday. I go to the computer room, we go through the formality of saying the Judge is here, the Clerk is here, the Sheriff is here, and the data processing thing is put into play for the selection of jurors.

Q. I'm talking about the method before we went to the complete computer. Is it not likely that this jury was picked up the old modified system rather than the new computer system? A. I can't tell you. I don't know. I can't tell you.

MR. HAMILTON: This is my recollection, Judge. I'm not testifying. This is my recollection. I believe—

THE COURT: All this testimony about what the situation now is with 106,000 people in the computer applies to this jury. I'm going to get my venire list.

MR. HAMILTON: I believe—and correct me if I'm wrong—we went into this about the computer and I think that the jurors that were serving the week of February 7th and, [36] perhaps, the week of February 14th were the last of the jurors that were not fed into this computer.

THE WITNESS: I can't answer that.

MR. HAMILTON: It seems to me—this is my recollection.

THE WITNESS: I don't even know. Again, I just don't know.

MR. KIRSCH: Well, is there a distinction between how you did it before and how you do it now? If so, could you tell us what the distinction is?

THE WITNESS: Well, there shouldn't have been any actual distinction. Jurors should have been made available regardless of age, but I don't know. All I know is that when you called it to my attention on February 7th, I was surprised that they weren't in and I immediately acted to put them all in and say we'll now excuse them—we'll do the excusing, not let somebody else downstairs excuse jurors in the operation of law.

I can't tell you how perfect or imperfect the system was. Like so many things, if it's not called to the Court's attention and the system is functioning, we just don't know. We hope that our system is pretty good and we

know it is. I can't tell you, as a matter of fact, whether prior to this time all persons over 65 were excluded—

Q. (By the Court) Let me check. Maybe if I show [37] you— A. —or what part were included or how the jury list was being prepared.

Q. Maybe if I show you the sheet, it will clarify it. A. Now, as I read this certificate, it tells me that the random jury selection was approved by the Florida Supreme Court on September 3, '71. I just don't know. You all know now how it's being done today.

Judge, looking at it, may I say the documents that I am looking at and the jury list and the physical papers are the same that we have today. It comes out the same way. I don't know—The only way I could make a judgment is to make a—determine how many people on this list were over 65.

MR. KIRSCH: It's been agreed, Judge, that Jane Carroll had indicated that she did not include anyone over 65 unless they made a formal request.

THE WITNESS: Well, then they weren't in there.

MR. HAMILTON: Unless they made a formal request.

THE WITNESS: Unless they made a formal request.

Q. The certification date is 14th day of January, 1972. A. I just—I know lately and I know after this time, but whether on Janury 14th it was out of the method here with the complete—what I call it, the jury disc file, I just [38] can't say for certainty and I just can't recall. The discs that we have are just what the word tells us. All the available draws are on this jury disc file.

In contrast to that, while we use the same machine to do it, we have punch cards and the cards were physically taken out even though they were supposed to be put in a box with the random selection. Then these cards were sealed and these cards put in the machine. The

machine went ahead and turned it out like you see here. You understand the step?

REDIRECT EXAMINATION

Q. (By Mr. Kirsch) Now, this is the panel— A. This is Judge Booher's venire for your trial date, apparently picked by me, and I know the date is right, but I can't tell you—I just don't know whether it was the jury disc file that we now used because of the closeness of time or whether it was the last of the last drawings.

I know this· that there was some publication at or about this time where Judge Warren was sort of paying tribute to the last method of hand-picking jurors. Do you recall that, any of you recall that?

MR. HAMILTON: Yes.

A. (continuing) Now, that might help us to—That's (indicating) my signature.

THE COURT: Yes, it sure is.

A. (continuing) It sure is my signature, but [39] I just can't tell you any more because it really didn't matter that much to me whether the punch cards were being fit into a machine to produce this or whether the jury disc file method which we now have was being used.

Q. When you say— A. We had to keep the system intact.

Q. Regardless of which one it was, it would have to be names which were set up from June 1st of '71 through June 1st of '72? A. Right. Right, because it was even shorter than that time, Mr. Kirsch, because we would—we'd ask the Jury Commission to do it at certain intervals because you are talking about 100,000 names, 100,000 cards. You are getting into weight problems to carry the stuff around. So it wasn't like it used to be.

Q. All right. A. You have hundreds of jurors every week.

Q. After the February 7th, 1972, hearing when you were first advised that jurors over 65 were not included in the jury list, did you discuss this with Miss Carroll? A. I didn't discuss it with her. I just issued an order. I said, "Put those names in it." I didn't have any time for discussion. The next day we had names.

Q. Over 70,000 names went in? A. There were mistakes in the past. If someone [40] raised it, fine; if they didn't raise it, they waived it and that's the law.

MR. KIRSCH: All right. Thank you, sir.

THE WITNESS: You can have these (indicating) if you'd like them, Judge, for the record, if you need it. These would tell you what I've said about certification from the 106 to the 176. I'll leave it here for information purposes.

MR. KIRSCH: Thank you, Judge.

THE COURT: Right. Oh, do either of you want either of these?

MR. KIRSCH: I would like to have them all introduced as part of the evidence.

MR. HAMILTON: I don't even know what they are.

MR. KIRSCH: Humn?

MR. HAMILTON: I don't know what they are.

MR. KIRSCH: They're just a certification by Judge—

MR. HAMILTON: Now?

MR. KIRSCH: —Minnet of what he did, of what the jury list was. I don't know whether—

THE COURT: I'll put it all in as a composite exhibit—

MR. KIRSCH: All right, sir.

THE COURT: —Plaintiffs' Exhibit 1 for the purposes of this hearing.

MR. KIRSCH: Yes.

(Whereupon, the aforementioned documents were marked [41] by the Court as Plaintiffs' Exhibit No. 1 and received in evidence.)

THE COURT: Do you have anything further?

MR. KIRSCH: I don't know what—whether there is any—again, any factual dispute here and the reason I mention that is the questions Your Honor asked Judge Minnet about whether this came from the computer or from the modified system there. If there is any question, fact question, it can be solved by calling Jane Carroll or we'll resolve it now as opposed to letting it go unanswered. I still think, without question, what she told you and what we agreed on is that the 65 years and over—over 65 were not included unless they made formal request.

THE COURT: Do you have argument?

MR. HAMILTON: Yes, sir. Judge, I'm going to ask your indulgence and Mr. Kirsch's indulgence. I would just like to make a few comments about what happened during the course of this trial and Tom Mimms has some citations he wants to give you. I know that normally you shouldn't bring it up, but he has the intelligence, I don't. I just want—

MR. MIMMS: Frank got us here anyway.

MR. HAMILTON: I just want to mention certain things. This trial started Monday, February the 7th and Mr. Kirsch before we picked the first juror in the box moved to challenge the panel and we had argument for approximately three hours, [42] from 9:00 to 12:00; and the thrust of Mr. Kirsch's argument was that people under the age of 21 were systematically excluded; his client was 18 or 19 years of age and that he was being deprived of his due process because they were systematically excluded.

As a result of your conversation with Mrs. Carroll about 11:00 o'clock, 11:15, Mr. Kirsch amended his motion to add people over 65. This was denied by the Court after lunch.

We then proceeded through five days—four days of trial, Friday morning closing argument. The jury deliberated Friday afternoon and subsequent to the beginning of the trial on two occasions I moved for a mistrial. I moved for a mistrial on Tuesday as a result of newspaper publicity, which was resisted by Mr. Kirsch. I moved for a mistrial because of alleged prejudicial comments in Mr. Kirsch's rebuttal argument in closing. This was resisted by Mr. Kirsch and it was denied.

I believe that if there were a serious attack on the qualifications of this jury, that the plaintiff could have joined in either of these motions and gotten his day in Court or gotten another day in Court with people 65 years old and older, but it was resisted on two occasions and I think that this put them in a very poor light to come in after they have gambled once. They have asked for a jury trial, they [43] have gambled and now they have come in. They have lost the point under 21 and pursuant we've had Mr. Nathan on the panel.

I am not going to belabor anything else, but Tom will give you some authority.

Go ahead, Tom.

MR. MIMMS: Judge, insofar as Frank's argument on waiver, we would cite 58 Am Jur 2d on new trial—that's 58 Am Jur 2d, Section 16, which deals with loss or waiver of right to move for a new trial when the party moving for a new trial has taken a position inconsistent with his assertion of the right to a new trial and that is what Mr. Hamilton was trying to argue here on that point.

Of course, Judge, I think we object to this whole proceeding. The time to build the record for a motion to quash the jury panel was at the time before trial began, before voir dire examination, and not to come in on a motion for a new trial and attempt to build the record

then. If there were going to be a record and a need for Your Honor to examine the record, Your Honor should have been able to examine the record at that time and not come back after the five-day trial and try to build a record.

My next point would be—I assume that Mr. Kirsch is waiving his attack on the exclusion of people under the age of 21. There is the Florida statute, of course, 40.01, Subsection (1), which provides that jurors must be over the [44] age of 21 and then State of Florida versus Silva that we discussed earlier. There was the specific issue of law in that case whether that statute was Constitutional. The Florida Supreme Court held the statute was Constitutional and that it was permissible to exclude people under the age of 21. That point has become moot, thanks to the Florida Supreme Court.

Now, the Silva case also in the portions cited by opposing counsel talks about intentional exclusion of economic, social, religious, racial, political or geographical groups. It does not talk about exclusion of age groups, which was the point involved in Silva, the exclusion of the age group of people under 21.

Now, continuing with the people of our argument, we would attack the plaintiffs' standing to even question exclusion of the over-65-age group. The plaintiff was a member of 18 or 19—He was 18 or 19. He was a member of the age group under 21. So obviously when the statute and the Silva case says it's permissible to exclude that age group, the plaintiff was being—was having a group that he was a member of excluded from consideration in the jury panel and he would, of course, have standing to raise that question until the Silva case and the statute came along. There is an A.L.R. annotation at 166 A.L.R. 1422 which deals with this question of exclusion of particular groups in a [45] civil trial and it holds in that

case that a party has no right or no standing to complain of exclusion of a group that he's not a member of. So we would cite that annotation as our authority as citing the prevailing rule here in the United States that a party has no standing to complain about exclusion of a group that he's not a member of.

Now, moving ahead to the women cases where women were excluded, we have a case called Bacom versus State at 39 So. 2d 794; and in that case Dade County specifically excluded all female citizens from consideration of jury duty and the Florida Supreme Court said in that case, "Well, we considered the record and failed to find that the appellant has been denied due process. The appellant has not shown he has not received a fair and impartial trial."

That's really what we're talking about here anyway, Your Honor. No one has a right to an error-free trial or a perfect trial. He has to show that whatever error may have been committed was prejudicial to him, that he was harmed by that error and there is a number of cases that go to that point.

In Douberly versus State—D-o-u-b-e-r-l-y—at 51 Fla., Page 41; at Southern Reporter, Volume 40, Page 675; and the Court noted in that case: "There is nothing in the record tending to show that the defendant was in any manner injured by the irregularities alleged in the [46] drawing and selection of the trial jury. The trial court, therefore, did not err in denying the motion in arrest of judgment."

Likewise, in the case of Penton—P-e-n-t-o-n versus State, 64 Fla. 411, which is—I don't have the Southern volume number on this one—

MR. MURPHY: It's too early.

MR. HAMILTON: Something 343.

MR. MIMMS: —something Page 343, but anyway in Penton versus State the Court held that: "An accused has the right to an impartial jury, but not to any particular persons as jurors. When no injury to the defendant has resulted therefrom, an irregularity not amounting to the denial of a substantial right in the selection and impaneling of the jurors will not avail on objection and exception.

"There is nothing to indicate that the defendant was injured, or that he has been denied a substantial right, in the use of the special venire drawn for another case."

There, of course, has been no showing here whatsoever today of prejudice or any harm to the plaintiff in this case.

THE COURT: By the way, if you want to note it for your records, that South cite is 60 South, Page 343.

MR. HAMILTON: 60? Thank you, Judge.

[47] MR. MIMMS: Thank you, Judge.

Now, Judge, we've heard a lot of argument here today too about the way our elections clerk went about excluding people from the jury panel. In Brown versus State, which is 26 So., Page 363; 40 Fla., Page 459 the Court held that even though under the old statute that people over the age of 65 had an exemption from jury duty, if they did come in for jury duty, that was not grounds for challenging them for cause; they still had a right—they were still qualified to serve as jurors; they were not unqualified simply because they were over the age of 65.

Now, even though that was the law, in Thomas versus State, 223 So. 2d 318, a 1969 Florida Supreme Court decision up in Leon County, the elections clerk up there says here:

"It has for many years been the custom for the Supervisor of Elections of Leon County, before submitting the

list of qualified voters to the County Commissioners for their use in preparing the master jury list, to delete therefrom those persons who are exempt or disqualified by law . . . from jury service. These are ministers, professors, teachers, students, lawyers, judges, people over the age of sixty-five, policemen, firemen . . ." and so on.

The Florida Supreme Court said that was all right under the old statute for the elections clerk to systematically exclude [48] these people even though they might be qualified to serve as jurors. So I don't think that the plaintiff can make any argument on that point.

Those are essentially the points that we want to make here, Your Honor; that the plaintiff doesn't have standing; that even if he did have standing, Mr. Nathan came in, he was over the age of 70; he was a member of this jury panel. The method used by the elections clerk in excluding people was proper at least under the old statute.

In Bacom versus State the Court held that it was all right to exclude women in that case because the plaintiff or the defendant moving for a new trial had not shown that he had been denied due process of law, he did not show that he had been denied a fair and impartial trial and in this case the plaintiff has made no showing or no attempt to even show that he was prejudiced or harmed in any way by the exclusion of jurors over the age of 65 and, finally, whatever rights he may have had have been waived.

MR. KIRSCH: May I reply, sir?

THE COURT: Yes.

MR. KIRSCH: First of all, Your Honor, I take exception to Mr. Hamilton's statement that we resisted the first motion for a mistrial. I think the Court will recall that this arose as a result of some very unfortunate newspaper publicity in which the Court was misquoted.

[49] THE COURT: In which I was quoted at all, which I shouldn't have been.

MR. KIRSCH: That's right, and I think the Court will recall that I made the statement that I thought that the proper method of treating this would be to inquire of any of the jurors whether they had read the newspaper article; but that if this article as such was in any way embarrassing to the Court or if the Court felt that the jury might have some knowledge of it, that I would join in with the motion for mistrial; and I think the Court recalls that clearly. I did not resist it.

The second motion for mistrial that was made was made on the basis that supposedly I had made a comment that Mr. Hamilton construed as being a Golden Rule comment and I did object to that because I felt that there was no such comment and it could not be so construed and I don't think Mr. Hamilton was very serious in his motion. He was just burdening the record.

I don't think we at any time indicated to this Court that we waived our rights on our motion to quash. In fact, we argued it very vigorously, if I might say so, sir, and I would like the Court to know at this juncture that the mere fact that I am not arguing our other grounds for the motion of a new trial, that we are in no way waiving them. I think we clearly set out what our grounds are. I don't want [50] the Court to be misled in thinking that this is our only ground for our motion.

Secondly, Your Honor, I submit to the Court that the law with regards to the selection of jurors and the prejudicial effect thereof has changed drastically since the cases cited by opposing counsel. They go back into 26 Southern and way on back in 60 Southern and sir, you just can't look at those old cases and say that that is the present status of the law of Florida today. These federal cases have drastically changed the laws of Florida and the laws of all the states regarding the right to have jurors that are untainted and this latest decision by the

Supreme Court of Florida, I think, clearly sets this forth; and even though they say in one portion thereof that, "Reluctantly we have to follow the mandate of the United States Supreme Court," they are following it and must do so.

So I think that you have to look at the recent cases, the federal cases and this case, the Silva case.

Now, sir, in the Silva case they don't talk about this man was or was not prejudiced or he was or was not a member of a particular class and had to be such. They just say if they didn't do what they should have done in the selection of the jury, that jury is tainted, it's out.

Now, in this Silva case, strange as it may be, they were trying to guarantee a proportionate share of blacks to [51] whites and men to women and they said that's bad; you can't do that; you can't do anything that would deprive a man of being tried by an impartial jury selected at random throughout the community and they commend the Jury Commission in trying to do what they thought was right. They say, "Even though you were trying to do what you thought was right, even though you were trying to make sure that the percentage of blacks got on the jury, et cetera, you can't do it."

Now, sir, I again say to Your Honor when they say that an 18 or 19-year-old boy is not prejudiced because he doesn't have random selection of a jury or because a certain segment of the population has been systematically excluded, it goes directly contra to the case I cited to Your Honor where common laborers were excluded, a Florida case, and they said that fact and that fact alone required reversal.

THE COURT: Weren't there racial overtones in the fact that most blacks are common laborers?

MR. KIRSCH: Judge, the record—the opinion in that case clearly says that there was not one bit of evidence

that blacks have been excluded. In fact, the evidence was just to the contrary. That's the Simmons case. The testimony in that case clearly, according to the opinion, I should say, established that there was no—there may have been some racial overtones, but the testimony was that they didn't [52] discriminate, there was no distinction between blacks or whites serving on the jury and the opinion and decision of the Court deals with merely one fact, the fact that common laborers were excluded. They don't go in there and say this man—he wasn't a common laborer; therefore, he can't complain. Common laborers weren't on the jury.

Now, sir, again I'd like to—I made the statement before and I would like to point it out again, sir. We know without question of the law now made by the Supreme Court of the United States that to systematically exclude Negroes from the jury would constitute grounds for a motion to quash and if it was not given, it would be error. What the defendants are saying is that unless you are a Negro, you could not complain about the fact that Negroes were systematically excluded from the jury. I say that is not so. If that jury is tainted, it is tainted to all white, black, yellow, red, no matter what color it is. I, as a white, might prefer in certain instances to be tried by a jury of six Negroes as opposed to a jury of six whites or to have jurors on that panel, I would assume—and I saw this documentary with Martin Luther King the other night, a three-hour documentary—I don't know if Your Honor saw it or not—

THE COURT: Unfortunately, I was not able to.

MR. KIRSCH: It was very interesting, but I assume [53] that it was white Unitarian ministers that marched from Selma to the capitol and were beaten up and what-have-you and arrested. When they were tried for disorderly conduct or blocking or obstructing traffic in what-

ever county they were tried in, I assume that they would rather have been—they would have preferred to be tried by six Negroes than six of those Alabama people that were doing the beating up on; and if that jury or that panel as it had been in Alabama excluding Negroes systematically, then they would have grounds to complain about that jury panel.

Now, I don't think that you can say, sir, that where there is an absolute showing of systematic exclusion of one of the largest segments of our population—and the proof of the pudding is, sir, they had 106,000 white or people—106,000 of all ages from 21 to 65 and when they start putting the over-65s in that list, it was seventy some thousand people who had been automatically and systematically excluded and that's just a portion of them in our county; but those seventy some thousand people who are now in the computer system or on the jury list had been automatically excluded from jury service at the time of this trial.

Here was a man that came in here and said, "Yes, I filed a formal request when somebody told me about it and I filed it. I wanted to serve on a jury. I wanted to be a juror," but maybe there is 100,000 over 65 who wanted to be [54] jurors who were never called because they were automatically excluded by Jane Carroll; and I say that you cannot—you cannot look at a case and say, "Well, he's a teen. Therefore, he's not prejudiced because 65 or olders weren't included. What if he had been 50? Where do you draw the line, sir, at 65, 64, 50, 25 or 6?

MR. HAMILTON: May I make just one comment?

THE COURT: Humn-humn.

MR. HAMILTON: Mr. Kirsch is relying on Simmons versus State. He indicates it's a cold statement of the law that says that you can't systematically exclude. I

take the position of Simmons versus State is for the authority that is within a class. Now, in the first paragraph—I'm on Page 443. They're talking—There is the color inference because there were two different types of cards, one for colored people, one for white; but more important than that, the case that was cited to you earlier by Mr. Kirsch, Thiel—T-h-i-e-l—versus Southern Pacific Company, 328 U.S. 217, 66 Supreme Court 984, 90 Law Edition 1181—and the opinion states forth an interesting discussion of the subject of discrimination and the selection of jurors by exclusion of a class. See, that case—that is the case after which our A.L.R. annotation came out, the A.L.R. annotation at 166 A.L.R. 1422 is the A.L.R. annotation interpreting the Thiel case; and it states that the Thiel case, which was a criminal case—[55] but Thiel was a member of a class which was systematically excluded; the class of which he was a member he did not have on his jury. This is what the A.L.R. annotation says. That's all I'm going to say. I think that if it's error, let the Appellate Court say it.

MR. KIRSCH: I disagree with that wholeheartedly. I think, Your Honor—I think that when a Judge is hit with something as we—as occurred in this case and as occurred many times while a Judge was sitting in a trial of a case, he has to make a ruling at that point; but upon review, if it is apparently obvious that there was an erroneous ruling, I think it's the Judge's duty—and I'm certainly not telling you anything that you disagree with—

THE COURT: If I felt there was any prejudice—I think I said it at the time. I just don't see how an 18-year-old can be prejudiced by not having someone over the age of 65 on his jury.

MR. KIRSCH: Your Honor, do you realize that there are a great number of grandparents who take a more

sympathetic view to an 18-year-old than maybe parents do? The point is it's not a question of Your Honor making a decision that is there a prejudice or not. Did she follow the law? Did she follow the statutes? And she didn't. I don't think there is any question about that in the drawing-up of these jury lists.

THE COURT: Not only that, but it appears that she [56] did the excluding and under the statute the Jury Commission is supposed to.

MR. KIRSCH: Nobody can exclude.

THE COURT: Well, people who are entitled to exclusion or were—

MR. KIRSCH: At the time this jury list was drawn nobody could be excluded except lawyers.

THE COURT: No, they couldn't be excluded unless they filed a certificate.

MR. KIRSCH: Unless they filed a certificate, but not—There is no question. You have the law and there is no question she didn't follow it and how—I submit, Your Honor, when you are talking about—Can you tell me, sir, if you look at the Simmons case, did they talk about—They just said if you exclude the class, that's it. When we look at the recent Supreme Court decision, they weren't picked at random. That was it. They didn't go in and say, "Well, now show us where the prejudice exists." They didn't pick them at random, bam. They shot it down.

The only cases you will find there that talk about prejudice, Your Honor, are the old cases dealing with women and they were exempt; and they came in and said, well, there is no showing of prejudice, but there they were following the statute and they were trying to declare the statute—saying that the statute wasn't Constitutional because it gave women [57] the right of exemption, but this is not the case here because the statute was completely violated, absolutely 100 percent violated.

THE COURT: Well, when you consider the citation in Silva on Page 11: "In the absence of any constitutional provision on the subject, and as long as the essential requisites of trial by jury are preserved, the qualifications of jurors are matters of legislative control, and, in the exercise of its control, the legislature may restrict, abridge, deny or enlarge the right and duty of jury service."

The old absolutely prejudicial and improper panel that would have been perfectly proper two years ago simply because of the change in law doesn't seem to me to go to a substantial right.

MR. KIRSCH: Your Honor, that is again not the case, sir, when you say that two years ago it would have been proper; two years ago it wouldn't have been proper either. Those 65-year-and-over people had to be on that jury list two years ago unless they came in and took affirmative action to be excused, which means that a large segment of the people 65 years of age and over would still be included on your jury list.

I submit further, Your Honor, that if they say that the 18, 19 and 20-year-olds can't serve because the [58] legislature hasn't seen fit to say that they can serve, but the legislature has seen fit to say that 65 and over shall serve—not may or may be exempt, but shall—that means that the legislative intent is that they shall and every person having a jury trial in this state is entitled to have random selection including those over 65 years of age. That is the legislative intent obviously when they remove the complete exemption. So I think Your Honor is in error when you say, sir, that they wouldn't have had to serve two years ago. They would have had.

THE COURT: I find interesting the comment of Mr. Justice Ervin in his dissent. He says: "However, I have grave doubts and dissent insofar as the opinion indicates state restrictions can be provided insofar as the age of jurors is concerned who have reached legal majority."

MR. KIRSCH: He thinks 18-year-olds should vote.

THE COURT: Eighteen years haven't reached legal majority. That would indicate that he thinks the majority opinion, as I do, can be construed to say you can exclude people on account of age as, say, for example, 65 or over—

MR. KIRSCH: I think—

THE COURT: —and Ervin is saying he has grave doubts about that.

MR. MURPHY: Isn't he talking about their right to [59] vote?

THE COURT: No, he says, "I have grave doubts and dissent insofar as the opinion indicates state restrictions can be provided insofar as the age of jurors is concerned who have reached legal majority." Well, one way or another, it's going to have to be decided by the Court of Appeals and I think it appropriate under these circumstances to deny the motion.

MR. KIRSCH: All right, sir.

THE COURT: What about the motion to tax costs?

MR. HAMILTON: Do you want—I'll tell you, I think we can settle it among ourselves. Do you have your notes, Judge Booher?

THE COURT: Yes.

MR. HAMILTON: Dr. Willis Dickens testified and Dr. David Taubel. Do you mark down the times?

THE COURT: I do.

MR. HAMILTON: Okay.

THE COURT: Dr. Taubel arrived at 2:41, went on the stand at 2:53 and was done at 3:22. So he was in the courthouse 41 minutes.

His offices are where?

MR. HAMILTON: It's down—500 17th Street Causeway.

THE COURT: So he's got a half hour each way.

MR. HAMILTON: Fifteen minutes each way.

IN THE
CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

No. 71-2845 Booher

JAMES CHARLES PAYNE, etc., et al,
Plaintiffs,

vs.

CITY OF FORT LAUDERDALE, et al,
Defendants.

ORDER

THIS CAUSE came on to be heard on plaintiffs' Motion for new trial and the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that plaintiffs' Motion for new trial be and the same is hereby denied.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, this 25 day of April, 1972.

/s/ Stephen R. Booher
Judge of the Circuit Court

IN THE
CIRCUIT COURT OF THE 17TH JUDICIAL
CIRCUIT IN AND FOR BROWARD
COUNTY, FLORIDA

No. 71-2845—Booher

JAMES CHARLES PAYNE, by and through his father and next friend, WALTER PAYNE, and WALTER PAYNE, individually

Plaintiffs

vs.

CITY OF FORT LAUDERDALE and LEO RICHARD PAULIN

Defendants

FINAL JUDGMENT

(Filed February 25, 1972)

Pursuant to the verdict rendered in this action,

IT IS ADJUDGED that plaintiffs JAMES CHARLES PAYNE and WALTER PAYNE, take nothing by this action and that defendants CITY OF FORT LAUDERDALE and LEO RICHARD PAULIN go hence without day and recover their costs in this cause expended from plaintiffs, said costs to be hereinafter taxed by the Court, for which let execution issue.

ORDERED at Fort Lauderdale, Florida, this 25th day of February, 1972.

/s/ Arthur J. Franza
Circuit Court Judge

IN THE
CIRCUIT COURT OF THE 17th JUDICIAL
CIRCUIT, IN AND FOR BROWARD
COUNTY, FLORIDA

Case No. 71-2845 "J" Booher

JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually,

Plaintiffs,

-vs-

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN,

Defendants.

MOTION FOR NEW TRIAL

COMES NOW the Plaintiffs, and move this Court to set aside the verdict in this cause and to grant the Plaintiffs a new trial on the following reasons:

1. The verdict is contrary to the law and to the evidence.

2. The verdict is contrary to the Court's charges.

3. The verdict is contrary to the manifest weight of the evidence.

4. The verdict is so manifestly against the weight of the evidence as to show on its face that the jury was influenced by prejudice, mistake, or passion.

5. The verdict is legally inconsistent with the proofs.

6. The Court erred in failing to allow into evidence the April 20, 1971 work order of the City of Fort Lauderdale Police Garage concerning automobile maintenance and

repair of Fort Lauderdale Police Cruiser # 52 after same was properly proffered by the Plaintiffs.

7. The Court erred in denying the Plaintiffs' request for an instruction to the jury concerning last clear chance.

8. The Court erred in denying the Plaintiffs the opportunity to utilize the sworn deposition of the Defendant, Leo Richard Paulin, for purposes of rebuttal testimony.

9. The Court erred in denying the timely motion made by the Plaintiffs whereby the entire panel and/or array of veniremen was challenged as being illegally constituted due to the systematic exclusion from such array of those duly qualified electors between 18 and 21 years of age, and those over the age of 65 years.

Kirsch & Druck
Attorneys for Plaintiffs
500 Courthouse Square Building
Fort Lauderdale, Florida
Phone: 525-8531
By Dale R. Sanders

I HEREBY CERTIFY that a copy of the above and foregoing was furnished to FLEMING, O'BRYAN & FLEMING, Attorneys for Defendants, at P.O. Box 4187, Fort Lauderdale Florida, this 18th day of February, 1972.

Dale R. Sanders

IN THE
CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA.

NO. 71-2845 Booher

JAMES CHARLES PAYNE, etc., et al.,
Plaintiffs,

vs.

CITY OF FORT LAUDERDALE, et al.,
Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTE that the Plaintiffs, JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually, do take and prosecute and enter this Appeal from the Trial Court's Order denying a new Trial to the Plaintiffs. The Trial Court's Order denying a new Trial is dated April 25, 1972, which order was entered on the motion of the Plaintiffs for a new Trial as to the jury verdict for the Defendants, which verdict was rendered February 11, 1972. This Appeal is taken pursuant to and by authority of Florida Statutes Section 59.04.

I HEREBY CERTIFY that a copy of the foregoing was mailed to: Fleming, O'Bryan and Fleming, Attorneys for Defendants, American National Bank Building, Fort Lauderdale, Florida, this 18th day of May, 1972.

Kirsch, Druck and Mills
Attorneys for Plaintiffs
500 Courthouse Square Building
Fort Lauderdale, Florida
525-8531
By Ellen S. Mills

IN THE
CIRCUIT COURT OF THE 17TH JUDICIAL
CIRCUIT, IN AND FOR BROWARD
COUNTY, FLORIDA

Case No. 71-2845 "J" Booher

JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually

Plaintiffs,

-vs-

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN,

Defendants

ASSIGNMENTS OF ERROR

The Plaintiffs, James Charles Payne, a minor, by and through his next friend and father, Walter Payne, and Walter Payne, individually, by his undersigned attorneys assigns as error to be asserted and relied upon by him on his appeal heretofore entered in this cause the following judicial acts of the above-styled court:

1. The Court erred in failing to allow into evidence the April 20, 1971 work order of the City of Fort Lauderdale Police Garage concerning automobile maintenance and repair of Fort Lauderdale Police Cruiser # 52 after same was properly proffered by the Plaintiffs.

2. The Court erred in denying the Plaintiffs the opportunity to utilize the sworn deposition of the Defendant, Leo Richard Paulin, for purposes of rebuttal testimony.

3. The Court erred in denying the timely motion made by the Plaintiffs whereby the entire panel and/or array of veniremen was challenged as being illegally con-

stituted due to the systematic exclusion from such array of those duly qualified electors between 18 and 21 years of age, and those over the age of 65 years.

4. The Court erred in entering the order denying Motion for New Trial, dated the 25th day of April, 1972 and recorded the 28th day of April, 1972.

5. The Court erred in entering the order and judgement taxing costs, dated the 27th day of April, 1972 and recorded in Circuit Court minute book 248, Page 435 on the 28th day of April, 1972.

Dated at Fort Lauderdale, Florida, this 26th day of May, 1972.

Kirsch, Druck & Mills
Attorneys for Plaintiffs
500 Courthouse Square Building
Fort Lauderdale, Florida
Phone: 525-8531
By /s/ Ellen S. Mills

I HEREBY CERTIFY that a copy of the above and foregoing was furnished to FLEMING, O'BRYAN & FLEMING, Attorneys for Defendants, at P.O. Box 4187, Fort Lauderdale, Florida, this 26th day of May, 1972.

/s/ Ellen S. Mills

IN THE
DISTRICT COURT OF APPEALS OF THE STATE
OF FLORIDA FOURTH DISTRICT

CASE NO.: 72-514

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually,

Appellant,

v.

CITY OF FORT LAUDERDALE, a municipal corporation and LEO RICHARD PAULIN,

Appellee.

BRIEF OF APPELLANT

Kirsch, Druck & Mills
Attorneys for Appellant
500 Court House Square Building
200 Southeast Sixth Street
Fort Lauderdale, Florida 33301
Telephone: (305) 525-8531

PREFACE

The Plaintiff, JAMES CHARLES PAYNE, will be referred to as the minor Plaintiff.

The Plaintiffs, JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE and WALTER PAYNE, individually, will be referred to as Plaintiffs.

The Defendant, CITY OF FORT LAUDERDALE, a municipal corporation, will be referred to as the Defendant, CITY OF FORT LAUDERDALE.

The Defendants, CITY OF FORT LAUDERDALE, a municipal corporation and LEO RICHARD PAULIN, will be referred to as Defendants.

Due to inadvertence, certain portions of the transcript of the proceedings of February 7, 1971 have not been included in the Record on Appeal Designations of this portion of the proceedings are presently being prepared by the Clerk. As soon as those portions have been numbered for the Record on Appeal, the Appellant will forward the citations from the Record which are presently blank on pages six and eight of the Appellant's Brief.

STATEMENT OF THE CASE AND FACTS

On April 6, 1971, the Plaintiffs filed their Complaint based on damages arising out of an accident which occurred on February 11, 1971. The minor Plaintiff was struck by a police cruiser while he was driving a motorcycle on 31st Avenue in Fort Lauderdale, Broward County, Florida. The police cruiser was owned by the Defendant, the City of Fort Lauderdale, and was driven by the Defendant, Leo Richard Paulin. At the time of the accident, the Defendant, Leo Richard Paulin, was an officer in the Fort Lauderdale Police Department and was acting within the course and scope of his employment. As a result of the accident, the minor Plaintiff's long finger on the left hand was amputated and his left leg was amputated above the knee.

Jury trial of the case was had before the Honorable Stephen R. Booher on the 7th through the 11th days of February, 1972. Prior to the commencement of the trial, the Plaintiffs objected to the composition of the entire panel of prospective jurors due to the systematic exclusion of a class of individuals that are eligible for jury duty

in the State of Florida. The class consists of individuals between the ages of 18 and 21 and individuals over the age of 65. The Plaintiffs challenge to the improper composition of the panel was overruled by the Court and the trial was commenced over the Plaintiffs' objection.

One of the major issues of fact in the trial was the defective condition of the brakes on the police cruiser at the time of the accident. Of probative value on this issue was the maintenance record of the cruiser which included a work order of April 20, 1971 for the repair of the brakes on the cruiser. The Court sustained the Defendants' objection to the introduction of this work order into evidence.

At the close of the Defendants' case, the Plaintiffs sought to introduce certain portions of the Defendant, Leo Richard Paulin's deposition. The Plaintiffs requested that portions of the deposition be read to the jury as rebuttal evidence or in the alternative that the Plaintiffs be allowed to re-open his case and introduce the deposition for the purpose of establishing when the Defendant, Leo Richard Paulin, first became aware of the motorcycle immediately prior to the accident. The Court refused to allow the introduction of portions of the deposition into evidence.

ARGUMENT

Point I on Appeal

WAS THE COMPOSITION OF THE PETIT JURY PANEL UNCONSTITUTIONAL DUE TO THE SYSTEMATIC EXCLUSION OF AN IDENTIFIABLE CLASS OF INDIVIDUALS THAT ARE ELIGIBLE FOR JURY DUTY?

Prior to the commencement of jury selection, the Plaintiffs challenged the unconstitutional composition of

the petit jury panel. (R pg 1104 through 1142). A lengthy hearing was held in which it was established that all individuals between the ages of 18 and 20 and all individuals over the age of 65 had been systematically excluded from the rolls of eligible jurors in Broward County. (R pg 1126 lines 12-23) Due to this systematic exclusion, the Plaintiffs moved to quash the panel and the motion was denied. (R pg 1129 lines 15-18)

The Court recognized that the systematic exclusion of both classes did exist (R pg 1126 lines 12-23) but ruled that absent a showing of some prejudice to the Plaintiffs' the motion to quash should be denied. (R pg 1133-1142)

The Court erred on both findings, in that prejudice to the Plaintiffs did exist and even if specific prejudice was not proven, the Plaintiffs have standing to challenge the unconstitutional composition of the petit jury panel.

-A-

The minor Plaintiff is a member of the class of individuals between the age of 18 and 20 that were systematically excluded from the rolls of eligible jurors in Broward County. The Plaintiffs recognize that in a recent decision, *State of Florida* v. *Silva*, Case No. 42-151 (Sup. Ct. 1972) the Supreme Court of the State of Florida upheld *Florida Statute Section 40.01 (1)* FSA which provides that jurors shall be taken from the male and female persons over the age of twenty-one years. In light of the *Silva* decision, we will not present further argument on this point except to state that the *Plaintiffs do not waive their contention that the exclusion of this class of citizen from the jury rolls resulted in prejudice to this minor Plaintiff* and that *Florida Statute Section 40.01 (1)* was unconstitutional as applied to this minor Plaintiff.

-B-

In the *Silva* case the Supreme Court of Florida discussed the lawful composition of juries and stated:

> "The tradition of trial by jury, considered in connection with either criminal or civil *proceedings*, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, however, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community for such complete representation would frequently be impossible. But it does mean that prospective jurors must be selected at random by the proper selecting official *without systematic and intentional exclusion* of any of these groups." pg. 9, *State of Florida* v. *Silva, Supra*

Florida Statute Section 40.01 (1) provides in pertinent part as follows:

> Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years. . . .

Under this Statute, individuals in Broward County over the age of sixty five who meet other jury qualifications are eligible for jury duty in Broward County, Florida. The evidence is clear that those individuals were systematically excluded from* * *.

* * *

DECISION

IN THE
DISTRICT COURT OF APPEAL OF THE STATE
OF FLORIDA FOURTH DISTRICT
JANUARY TERM 1973

CASE NO. 72-514.

JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually,

Appellants,

v.

CITY OF FORT LAUDERDALE, et al.,

Appellees.

Decision filed June 27, 1973.

Appeal from the Circuit Court for Broward County; Stephen R. Booher, Judge.

Dianne Weaver of Kirsch Druck & Mills, Fort Lauderdale, for appellants.

Frank E. Maloney, Jr., of Fleming O'Bryan & Fleming, Fort Lauderdale, for appellees.

PER CURIAM.

Affirmed.

CROSS and MAGER, JJ., and SMITH CULVER, Associate Judge, concur.

ORDER

IN THE
DISTRICT COURT OF APPEAL OF THE STATE OF
FLORIDA FOURTH DISTRICT
JULY TERM 1973

CASE NO. 72-514.

JAMES CHARLES PAYNE, etc., et al.,
Appellants

v.

CITY OF FORT LAUDERDALE, et al.,
Appellee

AUGUST 29, 1973

ORDERED that appellants' petition for rehearing, filed July 11, 1973, is hereby denied.

A true copy

/s/ Emmett J. Comiskey
Clerk

cc: Kirsch Druck Mills & Jones
Fleming O'Bryan and Fleming

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.:

JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually,

Petitioner,

vs.

CITY OF FORT LAUDERDALE, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioners present their Petition for Writ of Certiorari and state:

1. Petitioners seek to have reviewed an Order of the District Court of Appeal, Fourth District of Florida, dated June 27, 1973 and filed in the records of said District Court on June 27, 1973 in Minute Book 12 at Page 67.

2. Petitioners seek to have reviewed the Order of the District Court of Appeal, Fourth District of Florida, dated August 29, 1973 and filed on August 29, 1973 in Minute Book 13 at Page 109.

3. This Petition is presented pursuant to Article V, Section 3(b) (3) of the Florida Constitution and Rule 4.5c(6) of the Florida Appellate Rules.

4. This Petition is accompanied by conformed copies of so much of the record of the proceedings, including the decisions that Petitioners seek to have reviewed as is necessary to show jurisdiction in this Court and a Brief in Support of Jurisdiction.

5. The facts in the case are as follows:

A. On April 6, 1971, the Plaintiffs/Petitioners Complaint based on damages arising out of an accident which occurred on February 11, 1971.

B. In said accident the minor Plaintiff was struck by a police cruiser while he was driving a motorcycle on 31st Avenue in Fort Lauderdale, Broward County, Florida.

C. The police cruiser was owned by the Defendant, The City of Fort Lauderdale, and was driven by the Defendant, Leo Richard Paulin.

D. At the time of the accident, the Defendant, Leo Richard Paulin, was an officer in the Fort Lauderdale Police Department and was acting within the course and scope of his employment.

E. As a result of the accident, the minor Plaintiff's long finger on the left hand was amputated and his left leg was amputated above the knee.

F. Jury trial of the case was had before the Honorable Stephen R. Booher on the 7th through the 11th days of February, 1972.

G. Prior to the commencement of the trial, the Plaintiffs objected to the composition of the entire panel of prospective jurors due to the systematic exclusion of a class of individuals that are eligible for jury duty in the State of Florida.

H. The class consists of individuals between the ages of 18 and 21 and individuals over the age of 65.

I. The Plaintiffs challenge to the improper composition of the panel was overruled by the Court and the trial was commenced over Plaintiffs' objection.

J. On February 11, 1972 after two hours and twenty minutes of deliberation, the jury returned verdicts exonerating both Defendants.

K. A Final Judgment was entered on these verdicts on February 25, 1972 and the same was recorded in Circuit Court, Minute Book 242 at Page 595 on the same date.

L. The Plaintiffs filed a Motion for New Trial alleging, among other things, that the jury was illegally constituted and the trial judge denied Plaintiffs' Motion for New Trial.

M. Thereafter, Appellants' Notice of Appeal, Directions to the Clerk and Designations to the Reporter were timely filed.

6. On the foregoing facts, the District Court of Appeal was presented with the following question of law:

Was the composition of the petit jury panel unconstitutional because of the systematic exclusion of an identifiable class of individuals that were eligible for jury duty?

7. The District Court by affirming the Circuit Court per curiam decided the question negatively.

8. The same point of law was involved in *State of Florida* vs. *George Silva*, 259 So.2d 153 (Fla. 1972), decided

by the Florida Supreme Court on February 22, 1972. In the Silva case the Court held the tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community and means prospective jurors must be selected at random by the proper selecting officials without systematic and intentional exclusion of any of these groups.

9. The same point of law was involved in Chief Justice Vassor B. Carlton's clarification concerning composition of petit and grand juries which clarification was transmitted to the Honorable John G. Ferris, Chief Judge, Circuit Court, Seventeenth Judicial Circuit, Broward County Courthouse, Fort Lauderdale, Florida on July 10, 1973. In said clarification all juries, petit and grand, were ordered to be drawn from lists which shall include the names of individuals eighteen years of age and over with certain exceptions that are set forth in Petitioners Brief on Jurisdiction.

10. The decisions of the District Court of Appeal, Fourth District of Florida, that Petitioner seeks to have reviewed, are in direct conflict with the above-mentioned decisions of the Florida Supreme Court. Because of the reasons and authorities set forth in Petitioners' Brief, it is believed that the decisions sought to be reviewed were erroneous and the decision and order of the Supreme Court are correct and should be held by this Court to be the controlling law for the State of Florida.

WHEREFORE, Petitioners request this Court to grant a Writ of Certiorari and enter its order quashing the decisions and orders sought to be reviewed and approving the decision of the Florida Supreme Court as correct in

granting such other and further relief as shall seem right and proper to the Court.

DATED this 28th day of September, 1973.

Respectfully submitted,

Kirsch, Druck & Mills
Attorneys for Petitioners
P.O. Box 1262
Fort Lauderdale, Florida

By .....

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 28th day of September, 1973 to Frank E. Maloney, Jr., of FLEMING, O'BRYAN & FLEMING, American National Bank Building, 1415 East Sunrise Boulevard, Fort Lauderdale, Florida.

.....

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.:

JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually,

Petitioners,

vs.

CITY OF FORT LAUDERDALE, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioners present their Petition for a Writ of Certiorari and state:

1. Petitioners seek to have reviewed an Order of the District Court of Appeal, Fourth District of Florida dated June 27, 1973 and filed in the records of said District Court on June 27, 1973 in Minute Book 12 at Page 67.

2. Petitioners seek to have reviewed the Order of the District Court of Appeal, Fourth District of Florida dated August 29, 1973 and filed on August 29, 1973 in Minute Book 13 at Page 109.

3. This Petition is presented pursuant to Article 5, Section 4, of the Florida Constitution and Rule 4.5c(6) of the Florida Appellate Rules.

4. Accompanying this Petition are conformed copies of so much of the record of the proceedings, including the decisions that the Petitioners seek to have reviewed, as is necessary to show jurisdiction in this Court and a Brief in Support of Jurisdiction.

5. The facts in the case are as follows:

A. On April 6, 1971, the Plaintiffs/Petitioners filed their Complaint based on damages arising out of an accident which occurred on February 11, 1971.

B. In said accident the minor Plaintiff was struck by a police cruiser while he was driving a motorcycle on 31st Avenue in Fort Lauderdale, Broward County, Florida.

C. The police cruiser was owned by the Defendant, The City of Fort Lauderdale, and was driven by the Defendant, Leo Richard Paulin.

D. At the time of the accident, the Defendant, Leo Richard Paulin, was an officer in the Fort Lauderdale Police Department and was acting within the course and scope of his employment.

E. As a result of the accident, the minor Plaintiff's long finger on the left hand was amputated and his left leg was amputated above the knee.

F. Jury trial of the case was had before the Honorable Stephen R. Booher on the 7th through the 11th days of February, 1972.

G. Prior to the commencement of the trial, the Plaintiffs objected to the composition of the entire panel of prospective jurors due to the systematic exclusion of a class of individuals that are eligible for jury duty in the State of Florida.

H. The class consists of individuals between the ages of 18 and 21 and individuals over the age of 65.

I. The Plaintiffs challenge to the improper composition of the panel was overruled by the Court and the trial was commenced over Plaintiffs' objection.

J. On February 11, 1972 after two hours and twenty minutes of deliberation, the jury returned verdicts exonerating both Defendants.

K. A Final Judgment was entered on these verdicts on February 25, 1972 and the same was recorded in Circuit Court, Minute Book 242 at Page 595 on the same date.

L. The Plaintiffs filed a Motion for New Trial alleging, among other things, that the jury was illegally constituted and the trial judge denied Plaintiffs' Motion for New Trial.

M. Thereafter, Appellants' Notice of Appeal, Directions to the Clerk and Designations to the Reporter were timely filed.

6. On the foregoing facts the District Court of Appeal was presented with the following question of law:

Was the composition of the petit jury panel unconstitutional because of the systematic exclusion of an identifiable class of individuals that were eligible for jury duty?

7. The District Court by affirming the Circuit Court per curiam decided the question negatively.

8. The decisions of the District Court affect all supervisors of elections in the State of Florida and as such

affect a class of constitutional officers and a class of state officers. In addition, the decisions of the District Court affect all petit jurors in the State of Florida and as such affect a class of constitutional officers and a class of state officers. Therefore, the Supreme Court has jurisdiction to review said decisions by Writ of Certiorari. It is believed that the decisions of the District Court of Appeal sought to be reviewed are erroneous and the District Court of Appeal should have held that the composition of the petit jury panel was unconstitutional because of the systematic exclusion of an identifiable class of individuals that were eligible for jury duty.

WHEREFORE, Petitioners request this Court to grant a Writ of Certiorari and enter its Order quashing the decisions and orders sought to be reviewed and granting such other and further relief as shall seem right and proper to the Court.

DATED this 28th day of September, 1973.

Respectfully submitted,

Kirsch, Druck & Mills
Attorneys for Petitioners
P.O. Box 1262
Fort Lauderdale, Florida
Telephone: 525-8531

By .....

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 28th day of September, 1973 to Frank E. Maloney, Jr., of FLEMING, O'BRYAN & FLEMING, American National Bank Building, 1415 East Sunrise Boulevard, Fort Lauderdale, Florida.

.....

ORDER

IN THE
SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1973

THURSDAY, NOVEMBER 1, 1973

CASE NO. 44,423
JAMES CHARLES PAYNE, ETC., ET AL.,
Petitioners,
vs.
CITY OF FORT LAUDERDALE, ET AL.,
Respondents.

CASE NO. 44,424
JAMES CHARLES PAYNE, ETC., ET AL.,
Petitioners,
vs.
CITY OF FORT LAUDERDALE, ET AL.,
Respondents.

CASE NO. 44,448
JAMES CHARLES PAYNE, ETC., ET AL.,
Appellants,
vs.
CITY OF FORT LAUDERDALE, ET AL.,
Appellees.

The motion to consolidate is hereby granted and the above-styled causes are hereby consolidated for all appellate purposes.

Petitioners-Appellants are hereby allowed to and including November 16, 1973, to file jurisdictional brief relating to Case No. 44,448; respondents are allowed to and including November 30, 1973, to file jurisdictional brief on cases as consolidated, and it is further

ORDERED that in all other respects, the appeal is hereby stayed pending further order of the Court.

sg

cc: Messrs. Kirsch, Druck & Mills
Honorable Frank E. Maloney, Jr.
Honorable Clyde L. Heath

SUPREME COURT, U. S.

Supreme Court, U
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JUL 24 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually, *Petitioners,*

v.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

WILLIAM M. O'BRYAN
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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually, *Petitioners,*

v.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PREFACE

This brief is filed by Respondents CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, pursuant to Rule 24 (1), United States Supreme Court Rules, in opposition to petitioners' Petition for Writ of Certiorari seeking review of an Order of the Supreme Court of the State of Florida denying two petitions for writs of certiorari for lack of jurisdiction.

The parties will be referred to as they stand before this Court or as follows:

CITY OF FORT LAUDERDALE and LEO RICHARD PAULIN	Respondents Defendants Appellees
JAMES CHARLES PAYNE and WALTER PAYNE	Petitioners Plaintiffs Appellants

The following symbols will be used:

AR	Appendix of Respondents
AP	Appendix of Petitioners

All emphasis is that of respondents, unless otherwise indicated.

OPINIONS BELOW

The opinions of the courts below directly preceding the Petition in this case are as follows:

1. Final Judgment pursuant to jury verdict dated February 25, 1972, unreported (AP. 79).
2. Opinion of the District Court of Appeal of Florida, Fourth District, affirmance per curiam, unreported (AP. 90).
3. (a) Order of the Supreme Court of Florida dated February 25, 1974, denying petitions for writs of certiorari for lack of jurisdiction, unreported (AP. 1-2).

   (b) Order of the Supreme Court of Florida dated March 19, 1974, dismissing appeal, unreported (AR. 1)

QUESTIONS PRESENTED *

I.

WHETHER PRIOR TO JULY 1, 1973, SECTION 40.01 (1), FLORIDA STATUTES, QUALIFICATIONS AND DISQUALIFICATIONS OF JURORS, WAS IN CONFLICT WITH THE TWENTY-SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

II.

WHETHER THE EXCLUSION OF PERSONS EIGHTEEN, NINETEEN AND TWENTY YEARS OF AGE FROM JURY VENIRES AND THE REQUIRING OF INDIVIDUALS OVER THE AGE OF SIXTY-FIVE TO WAIVE A PERSONAL EXEMPTION FROM HAVING TO SERVE ON JURIES WAS IN CONFLICT WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

This case arose over a vehicular collision on February 11, 1971, in which the minor plaintiff sustained injuries. In their complaint the plaintiffs alleged that the minor plaintiff's injuries were the result of the negligence of the individual defendant, Officer PAULIN, and that the Defendant CITY OF FORT LAUDERDALE was liable under the theory of respondeat superior. The defendants answered that the collision was due to the minor plaintiff's own negligence.

Prior to the jury voir dire examination at trial on February 7, 1972, counsel for plaintiffs objected to the entire jury venire, due to the exclusion of eighteen, nineteen and twenty-year olds. Testimony was taken to determine exactly how jury lists were prepared in Broward County, Florida (AP. 4-34).

---

* For clarity, respondents have reworded the Questions Presented.

During this process the trial judge, The Honorable STEPHEN R. BOOHER, telephoned the Broward County Supervisor of Elections, Jane C. Carroll. She advised him that lists were prepared from registered voters between the ages of twenty-one and sixty-five. However, she stated that individuals over sixty-five could serve if they simply requested to be included on the jury lists (AP. 22).

The Honorable JOHN H. MOORE, III, also a Judge in said Circuit, was present at this hearing and he informed the Court that the 1970 Session of the Florida Legislature had removed the personal exemption for individuals over sixty-five by Chapter 70-138, Laws of Florida (AP. 24).

At this point, after twenty-five pages of argument and testimony, counsel for plaintiffs amended his challenge to the jury venire to include the "exclusion" of those over sixty-five years of age as well as those under twenty-one years of age.

The trial judge determined that there was no constitutional taint to this jury venire and found that there was no systematic exclusion of those over sixty-five years of age as a matter of law (AP. 31).

At the conclusion of this hearing, voir dire was held. During the process of selecting the jury, Mr. Murray Nathan was called as a prospective juror. Upon examination by the Court, he testified that he was seventy years of age (AP. 42). He was obviously in the jury venire to have been called as a prospective juror for this case.

The cause then proceeded to trial with the jury delivering a verdict on February 11, 1972, exonerating

both defendants. The final judgment was entered pursuant to that verdict (AP. 79).

The plaintiffs filed their Motion for New Trial alleging fault with the jury verdict, failure to give certain jury instructions, denial of rebuttal and the makeup of the jury venire. A full hearing was held with testimony being taken (AP. 35-77).

The motion was denied and the plaintiffs took an appeal to the Florida Fourth District Court of Appeal (AP. 82). After that Court considered the briefs of law and heard oral argument, the final judgment was affirmed per curiam without opinion (AP. 90). Petition for Rehearing was then filed and subsequently denied.

The plaintiffs then sought review of the Fourth District Court of Appeal's order through the Florida Supreme Court, pursuant to Florida Appellate Rule 4.5 (c)(6) and Article 5, Section 3 (b) (3), Constitution of the State of Florida by filing two Petitions for Writs of Certiorari.

In the first Petition (AP. 92), plaintiffs alleged that the final judgment, as affirmed, was in conflict with a letter of Chief Justice Vassar B. Carlton of the Florida Supreme Court to the Honorable John G. Ferris, Chief Judge of the Seventeenth Judicial Circuit, in and for Broward County, Florida, said letter being dated July 10, 1973. This letter stated that due to the Florida Legislature's enactment of Chapter 73-21, Laws of Florida, (AR. 2) jury venires should now include eighteen, nineteen and twenty-year-old individuals who had become adults by law on July 1, 1973—a year and a half after this trial.

The Second Petition for Writ of Certiorari (A. 97) stated that the plaintiffs felt that the per curiam affirmance somehow effected a class of Florida constitutional officers: Supervisors of Elections.

By Order dated February 25, 1974, the Supreme Court of Florida entered an Order stating that it did not have jurisdiction to issue a Writ of Certiorari to review the Order of the Fourth District Court of Appeal.

Plaintiffs also sought to bring a direct appeal to the Florida Supreme Court from the Order of the Fourth District Court of Appeal. This appeal was based on the same grounds as the Petition for Writ of Certiorari before this Court. Defendants moved to have the appeal dismissed as frivolous. Upon consideration of this motion, the appeal was dismissed (AR. 1).

The plaintiffs have not asked this Court to review this Order. They have, instead, only asked that the Order of the Florida Supreme Court holding that it did not have jurisdiction to grant Petitions for Writs of Certiorari be reviewed.

ARGUMENT

I.

Prior to July 1, 1973, Section 40.01 (1), Florida Statutes, Qualifications and Disqualifications of Jurors, Was Not in Conflict with the Twenty-Sixth Amendment of the United States Constitution.

By bringing this Petition for Writ of Certiorari, the petitioners have used an improper method of challenging the constitutional validity of Section 40.01 (1), Florida Statutes, as it existed prior to July 1, 1973.

The Florida Supreme Court, in dismissing petitioners' appeal, in effect upheld the constitutional validity of that statute. Where the validity of a state statute is challenged in the state courts and upheld, the vehicle for review is appeal to this Court, not a petition for writ of certiorari:

> "28 USC § 1257. State courts; appeal; certiorari
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Between the time of the adoption of the Twenty-Sixth Amendment to the United States Constitution and the Florida Legislature extending the privileges of majority to those individuals between the ages of eighteen and twenty, the Florida Supreme Court had twice considered this very point of law in light of the decisions of this Court. On both occasions the Florida Supreme Court upheld the validity of the requirement that persons must be over the age of twenty-one years to serve on juries.

The first challenge to this statute was in the case of *State* v. *Silva*, 259 So. 2d 153 (Fla., 1972), wherein the Florida Supreme Court held that the Twenty-Sixth Amendment said nothing about the jury make-up and that the individual states were free to require jurors to be at a minimum age of twenty-one to serve, at pages 161 and 162:

> "We turn to the second question, which is answered in the affirmative. The Twenty-Sixth Amendment to the United States Constitution pro-

vides that the *right* of citizens eighteen years of age or over *to vote* shall not be denied or abridged by the United States or by any state on account of age. This amendment has no bearing on eligibility of persons for jury service.

Fla. Stat. § 40.01(1), F.S.A., provides that jurors shall be taken from the male and female persons *over the age of twenty-one years,* who are citizens of the State and who have resided in the State for one year and in their respective counties for six months, and who are fully qualified electors of their respective county. *Since the Twenty-Sixth Amendment to the United States Constitution says nothing about jury service, the State is free to require that jurors be over twenty-one years of age, as each state has the power to establish the qualifications for jurors to serve in its courts.* 47 Am. Jur.2d, Jury, § 96, p. 707.

The following appears in 47 Am.Jur.2d, Jury, § 102, p. 711:

> "The right to vote and the privilege and qualification to serve as a juror are not correlative or necessarily coexistent. Thus, while electors and jurors may have some requirements in common, a person may be a qualified elector and yet not be a qualified juror, and vice versa."

50 C.J.S. Juries § 134, pp. 861-862, contains the following:

> "In the absence of any constitutional provision on the subject, and as long as the essential requisites of trial by jury are preserved, the qualifications of jurors are matters of legislative control, and, in the exercise of its control, the legislature may restrict, abridge, deny or enlarge the right and duty of jury service."

* * *

In *Carter* v. *Jury Commission of Greene County,* 396 U.S. 320, 90 S.Ct. 518, 24 L. Ed. 549 (1970),

quoted extensively in our discussion of the third question, *the Court recognized the right of the State to confine the jury selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character.* See also Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961).

Approximately one and a half years after the trial in this case, the Florida Legislature extended the privileges of adulthood to eighteen, nineteen and twenty year olds. This is found at Chapter 73-21, Laws of Florida, Section 1.01 (14), *F.S.*, and this in effect amended the minimum age for jury service to eighteen rather than twenty-one.

Throughout the state there was some lag in placing these individuals on jury venires. In the case of *Reed* v. *State,* 292 So. 2d 7 (Fla., 1974), this lag was challenged in Dade County, Florida. There was also a challenge as well on the constitutionality of the statute prior to July 1, 1973. The Florida Supreme Court again upheld the validity of the statute in light of the decisions of this Court at pages 9 and 10:

> [1] As was carefully and extensively set forth in State v. Silva, *supra,* the tests for voting eligibility and jury duty eligibility are not necessarily identical, and it is within the control of the Legislature to determine juror qualifications in the absence of any constitutional mandate. We are not confronted with the 1973 Act of the Legislature [Ch. 73-21, Laws of Florida] granting adult rights to 18-year-old citizens. Under this law, the 18-year-old citizen is now eligible for jury service.
>
> *The right of the State to determine the quality of juries in the State courts has always been recog-*

nized by the United States Supreme Court. In Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1952), the Supreme Court considered a North Carolina statute which provided that the selection of jurors should be on the basis of property tax lists. In upholding the statute, the Supreme Court said:

> "States should decide for themselves the quality of their juries as best fits their situation so long as the classifications have relation to the efficiency of the jurors and are equally administered.
>
> "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty. Short of an annual census or required population registration, these tax lists offer the most comprehensive source of available names. We do not think a use, nondiscriminatory as to race, of the tax lists violates the Fourteenth Amendment, nor can we conclude on the evidence adduced that the results of the use require a conclusion of unconstitutionality." (344 U.S. pp. 473, 474, 73 S.Ct. p. 416, 97 L.Ed. pp. 497-498)

A similar pronouncement was made in Carter v. Green County, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970), where the Court upheld an Alabama statute governing jury selection by commissioners. The Supreme Court in its opinion said:

> "It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors. The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possess-

> ing good intelligence, sound judgment, and fair character. 'Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.'
>
> ". . . Nearly every State requires that its jurors be citizens of the United States, residents of the locality, of a specified minimum age, and able to understand English. Many of the States require that jurors be of 'good character' or the like; some, that they be 'intelligent' or 'well informed.'" (396 U.S. pp. 332, 333, 90 S.Ct. p. 525, 24 L.Ed.2d pp. 559-560)

This Court has consistently held that the states have the right to determine the qualifications of juries to be used within their state courts. See *Brown* v. *Allen,* 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1952) and *Carter* v. *Green County,* 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970).

The Petition for Writ of Certiorari should be denied.

II.

The Exclusion of Persons Eighteen, Nineteen and Twenty Years of Age from Jury Venires and the Requiring of Individuals Over the Age of Sixty-Five Waiving Personal Exemption Is Not in Conflict with the Fourteenth Amendment to the United States Constitution.

Another challenge made regarding this jury panel by plaintiffs was regarding the exclusion of registered voters over the age of sixty-five. Circuit Judge Moore had pointed out that § 40.08, *F.S.,* had been amended by Chapter 70-138, Laws of Florida, to exempt attorneys only. At the hearing (AP. 4-34) prior to trial, it

was stipulated by counsel for all parties that Jane C. Carroll, the Supervisor of Elections in Broward County, would say she compiled lists from registered voters between the ages of twenty-one and sixty-five years. Obviously, from this testimony Ms. Carroll was not aware that § 40.08, *F.S.,* had been amended.

Prior to July 1, 1970, § 40.08, *F.S.,* had specifically exempted those over the age of sixty-five, and a number of specific professions such as millers, ferry boatmen, train dispatchers, etc. Exemption from jury service in Florida was *not disqualification* but merely a personal privilege of those individuals which they could avail themselves of if they so chose. Such exemption could not be used to challenge a prospective juror for cause. See *Crosby* v. *State,* 90 Fla. 381, 106 So. 741 (Fla., 1926), which held that exemption offered the aged in old § 40.08, *F.S.,* was a privilege and did not have the effect of disqualifying such person from jury service.

Due to the ever-present possibility of having an "insufficient Grand Jury list and a petit jury venire that would soon be exhausted" due to high percentages of exempt persons, it soon became the practice of the various Supervisors of Elections to delete from prospective jury lists the names of all voters who were exempt under § 40.08, *F.S.* This practice was challenged in the Florida Supreme Court in *Thomas* v. *State,* 223 So. 2d 318 (Fla., 1969). Justice Roberts, speaking for a unanimous court, wrote that this practice was perfectly permissible "as a matter of practical necessity".

Because individuals who were exempt from jury service were not disqualified, a procedure had to be developed for those who wished to waive their personal privilege of not having to sit on juries. Prior to 1967 a per-

fect procedure existed in § 40.01 (1), *F.S.*, which exempted all women and required those women who wished to serve to register with the Clerk of the Circuit Court:

> "40.01 Qualifications and disqualifications of jurors.—
>
> (1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year, and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, *however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.*"

This courtesy was extended as a matter of local custom to exempt persons who wished to waive their exemption:

> "THE COURT: Let's make it clear here, also, that all people over 65 were not excluded. Those who requested the ability to serve were included.
>
> MR. KIRSCH: By whom?
>
> THE COURT: By Mrs. Carroll. The rule applied prior to '70, the '70 amendment, and which she is applying now is that they are not put on the panel unless they requested it. If they do, then they go on the panel." (AP. 33)

The exact procedure used in the instant case for persons over sixty-five years of age was upheld when used for women by the Florida Supreme Court and this Court in *Hoyt* v. *State,* 119 So. 2d 691 (Fla., 1959), and *Hoyt* v. *State of Florida,* 368 U.S. 57, 82 S.Ct. 159,

7 L.Ed.2d 118. In that case, the Florida and the United States Supreme Courts held that the procedure of requiring women to register for jury service to waive their privilege not to serve on juries both constitutional as applied to all women, and constitutional as applied to a white female criminal defendant in Hillsborough County, Florida.

The Courts went on further to specifically state that the requirement that women register for jury service was *in no way an arbitrary and systematic exclusion* of those eligible for jury service. It must be noted that even under old § 40.01 (1) women were never ineligible for jury service, but merely privileged not to serve, as were individuals over sixty-five under the old § 40.08. The requirement that they register to waive their privilege before being placed on jury venires was specifically held not to be a systematic exclusion.

The issue of whether the exclusion of any age group from a jury venire effects the constitutional rights of the litigants has been considered a number of times with the consistent holding that it does not infringe upon said rights.

The Florida Supreme Court recently considered this question in light of the opinions of this Court in the case of *Reed* v. *State, supra.* In that case the Florida Supreme Court correctly held that there was no constitutional taint when young adults were excluded and those over the age of sixty-five were treated differently than other potential jurymen.

The U. S. Court of Appeals, Fifth Circuit, has also considered this question in a case arising out of Florida: *United States* v. *Kuhn,* 114 F.2d 179 (5th Cir.,

1971), wherein it was held that there was no constitutional taint to the jury even though young adults were excluded because jury lists were only made up once every five years.

The U. S. Court of Appeals, First Circuit, in the case of *King* v. *United States,* 346 F.2d 123 (1st Cir., 1965), held that there was no constitutional taint in a jury which excluded persons between the ages of 21 and 25 and over the age of 70.

The petition for writ of certiorari should be denied.

CONCLUSION

Based on the authorities and arguments cited herein, it is respectfully suggested that the petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM M. O'BRYAN
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764-3000 945-2686
Attorneys for Respondents

APPENDIX

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1974

TUESDAY, MARCH 19, 1974

CASE NO. 44,448

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

72-514

JAMES CHARLES PAYNE, ETC., ET AL., *Appellants,*

v.

CITY OF FORT LAUDERDALE, ET AL., *Appellees.*

On consideration of the Motion for Dismissal filed March 4, 1974, the Order of February 25, 1974 is vacated and the cause is hereby dismissed.

A TRUE COPY
TEST:
SID J. WHITE
Clerk Supreme Court.

By: /s/ KAY O. GENT
Deputy Clerk

CC: Hon. E. J. Comiskey, Clerk
Hon. Clyde Heath, Clerk
Hon. Stephen R. Booher, Judge
Fleming, O'Bryan & Fleming
(Hon. Frank E. Maloney, Jr.)
Kirsch, Druck & Mills
(Hon. Ben J. Weaver)

Ch. 73-21

1973 REGULAR SESSION

MINORS—DISABILITIES OF NONAGE

CHAPTER 73-21

SENATE BILL NO. 152

An Act relating to the rights of majority; creating section 1.01(14), Florida Statutes; providing a definition of minor; providing that the disabilities of nonage shall be removed for all persons of eighteen years of age or older; providing that this act shall not affect court-ordered support; providing a severability clause; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (14) of section 1.01, Florida Statutes, is created to read:

1.01 Definitions

In construing these statutes and each and every word, phrase or part hereof, where the context will permit:

(14) The word "minor" includes any person who has not attained the age of 18 years.

Section 2.

The disability of nonage is hereby removed for all persons in this state who are 18 years of age or older and they shall enjoy and suffer the rights, privileges and obligations of all persons 21 years of age or older except as otherwise excluded by the Constitution of the State of Florida immediately preceding the effective date of this act. Provided, however, this act shall not prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years; and provided further that any crippled child as defined in chapter 391, Florida Statutes, shall receive benefits under the provisions of said chapter

until age 21, the provisions of this act to the contrary notwithstanding.

Section 3.

This act shall operate prospectively and not retrospectively and shall not affect the rights and obligations existing prior to the effective date of this act.

Section 4.

Any law inconsistent herewith is hereby repealed to the extent of such inconsistency. In editing the manuscript for the next revision of the Florida Statutes, the statutory revision and indexing service is hereby directed to conform existing statutes to the provisions of this act.

Section 5.

In the event that any provision or application of this act is held to be invalid, it is the legislative intent that the other provisions and applications hereof shall not be thereby affected.

Section 6. This act shall take effect July 1, 1973.

Approved by the Governor May 9, 1973.

Filed in Office Secretary of State May 9, 1973.

SUPREME COURT, U. S.
SEP 11 1974
MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually,

Petitioners,

vs.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN,

Respondents.

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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Respondents.

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PREFACE

This Reply and Supplemental Brief is filed by Petitioners, JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually, pursuant to Rule 24, United States Supreme Court Rules, in support of Petitioners' Petition for a Writ of Certiorari.

ARGUMENT

I

The Exclusion of Persons 18, 19 and 20 Years of Age from Jury Venires and the Requiring of Individuals Over the Age of 65 Waiving Personal Exemption Is in Conflict with the Fourteenth Amendment to the United States Constitution.

Respondent places great reliance on a prior sex discrimination decision of the United States Supreme Court holding constitutional the procedure of requiring women to register for jury service as a pre-condition for the eligibility to participate on a Jury. However, Petitioners would call to this Court's attention the case of *Healy* v. *Edwards*, 42 LW 1041, wherein a United States District Court struck down Louisiana's jury sex classification statute and constitutional provisions. Under said statute and provisions, women could serve on juries only by filing a written declaration of desire to do so, just as the challenged Florida statute in the instant cause, requires an affirmative declaration of individuals over the age of 65 of their desire to participate in jury service.

As this Court is aware, the decision in the case of *Healy* v. *Edwards* is now before it for ultimate disposition. Just as the time has come for the Court to abandon decisions grounded on invalid, outmoded conceptions of the role of women in society, Petitioners submit that the time has come to abandon any similar classification based on age, as irrational and unconstitutionally invalid. It is significant to note that without making an independent affirmative declaration of their desire to do so, certain members of this United States Supreme Court could not have served on a jury panel in the instant cause, since they are

over the age of 65. There being no relationship between a person's age over the age of 65, and his or her potential contributions to society, needs or abilities, such classifications are irrational and cannot be supported by vague notions of "courtesy" as urged by Respondents.

II

The United States Supreme Court Should Reverse This Cause and Remand It for a New Trial in Accordance with the Doctrine of Comparative Negligence Adopted by the Florida Supreme Court Subsequent to the Trial of This Cause.

The Trial of this negligence action was terminated on February 25, 1972, by the entry of a Judgment on Jury Verdicts in favor of Respondents and against the Petitioners. By opinion dated July 10, 1973, however, the Supreme Court of the State of Florida in the case of *Hoffman* v. *Jones*, Fla. 1973, 280 So. 2d 431, adopted the doctrine of comparative negligence under which a litigant's recovery would be reduced only in proportion to his own negligence and not eliminated altogether by any negligence which might be found to have contributed to his injuries. In so ruling, the Florida Supreme Court reversed controlling precedent of the law of the State of Florida set down by the Florida Supreme Court in *Louisville and Nashville Railroad Company* v. *Ynestra*, (1886) 21 Fla. 700, and justifiably relied upon by Counsel for Petitioners in prosecuting the negligence Action.

In *Hoffman* v. *Jones* the Supreme Court of Florida held that its opinion would be applicable to those cases in which Judgment had already been rendered if the applicability of the comparative negligence rule were raised during some stage of the litigation, and further, would be applicable to those cases on appeal in which the applicabil-

ity of the comparative negligence rule was made a question of appellate review. Accordingly, Petitioners submit that since the applicability of comparative negligence rule has been raised during a stage of the instant litigation, this Cause should be remanded to the Trial Court for a new Trial in light of the adoption by the State's highest Court of the doctrine on comparative negligence.

CONCLUSION

Based on the authorities and arguments cited herein, it is respectfully submitted that the Petition for Writ of Certiorari should be granted and/or this Cause remanded to the Trial Court for a new Trial in light of the Florida Supreme Court's adoption of a doctrine of comparative negligence.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply and Supplemental Brief in Support of Petition for a Writ of Certiorari to the Supreme Court of the State of Florida has been mailed to FRANK E. MALONEY, ESQUIRE, Attorney for Respondent, American National Bank Building, Fort Lauderdale, Florida 33304 this 10th day of September, 1974.

DRUCK, GRIMMETT, NORMAN & WEAVER
Post Office Box 1262
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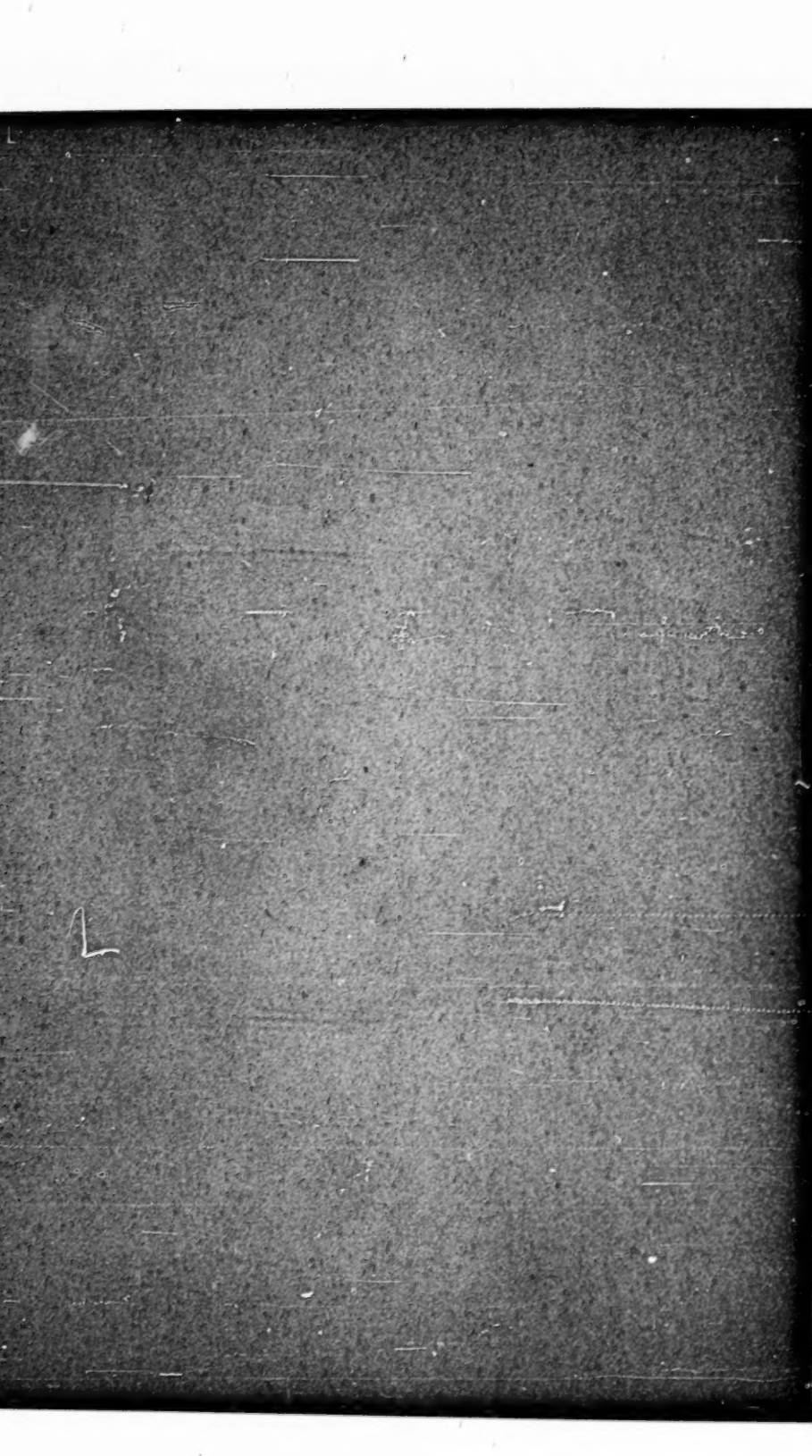
Attorneys for Petitioners

By: .....



SUPREME COURT, U. S.
SEP 27 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually, *Petitioners*,

v.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, *Respondents*.

RESPONDENTS' BRIEF IN REPLY TO PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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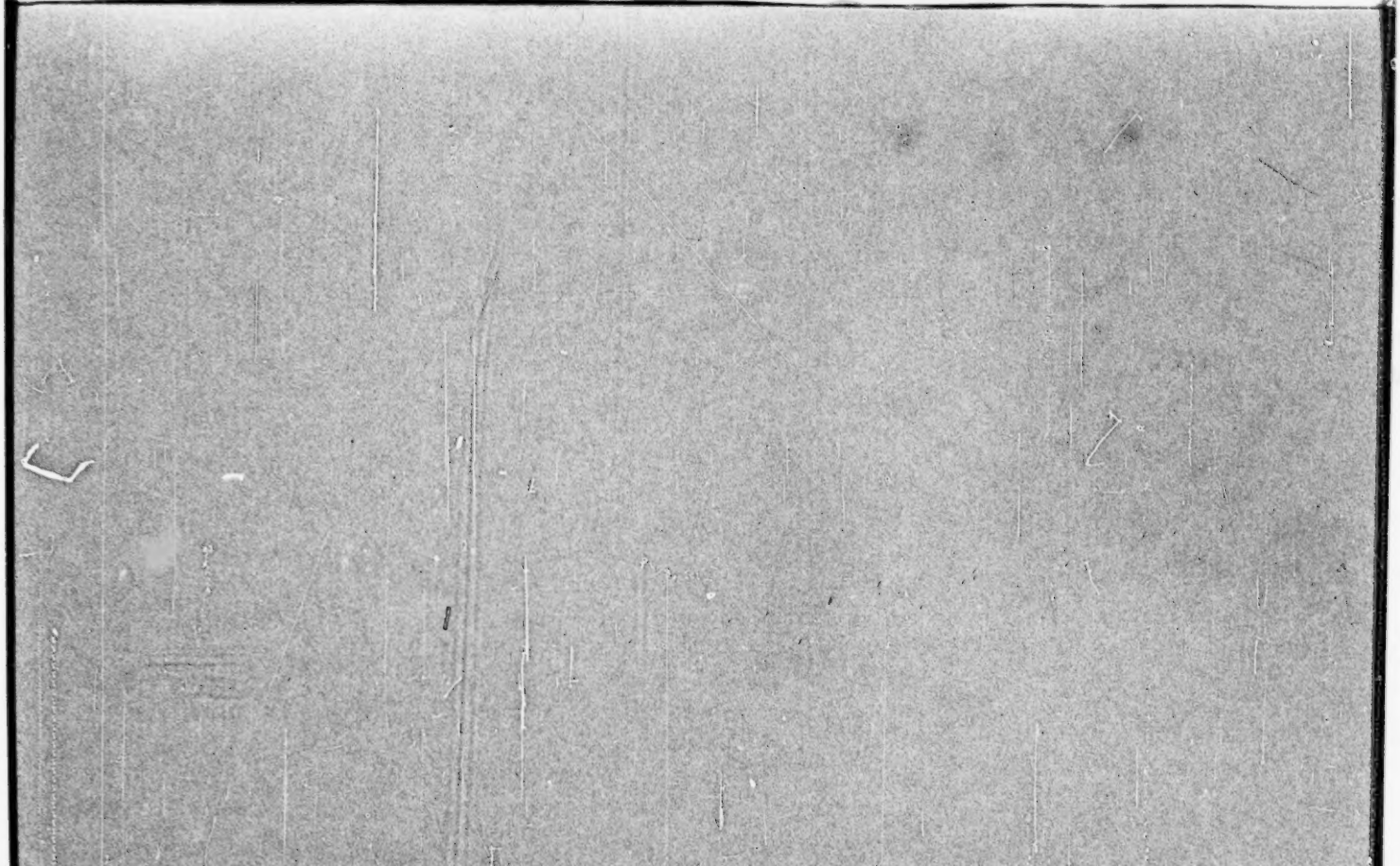

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, Individually, *Petitioners,*

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RESPONDENTS' BRIEF IN REPLY TO PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PREFACE

This brief is filed by Respondents CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN, pursuant to Rule 24 (4), United States Supreme Court Rules, in response to the "Reply and Supplemental Brief" of petitioners.

The petitioners have asserted that said brief, dated September 10, 1974, is filed pursuant to Rule 24; however, the brief does not comply with the provisions set forth for reply briefs as found in Rule 24(4) or for supplemental briefs as found in Rule 24 (5).

The "Reply and Supplemental Brief" does not respond to any "arguments first raised in the briefs in opposition". The petitioners' brief instead raises new argument in addition to that found in the petition for certiorari and the response brief of respondents.

The cases cited in petitioners' brief are not "new" *and* "intervening" cases decided since the petition for writ of certiorari was filed with this Court. The petitioners have relied on two additional cases:

Healy v. *Edwards,* 363 F. Supp. 1110 (E.D. La., 1973) (decided August 31, 1973); and

Hoffman v. *Jones,* 280 So. 2d 431 (Fla., 1973) (decided July 10, 1973).

Both of these cases were well over a year old and had long since been reported at the time the petitioners filed their "Reply and Supplemental Brief".

The petitioners are neither in compliance with the letter nor the spirit of this Court's rules.

The parties will be referred to as they were in respondents' brief in opposition to petition for certiorari to the Supreme Court of Florida and the same symbols will be used as were used in that brief. All emphasis is that of the respondents, unless otherwise indicated.

ARGUMENT

I

The Exclusion of Persons 18, 19 and 20 Years of Age from Jury Venires Prior to July 1, 1973, and the Requiring of Individuals Over the Age of 65 Waiving Personal Exemption Is Not in Conflict with the Fourteenth Amendment to the United States Constitution.

The petitioners have asserted as the crux of their argument that "the time has come to abandon any similar classification based on age, as irrational . . .".

From the petitioners' argument it appears that they have not kept abreast of developments in Florida and in Broward County, in particular, in the selection of jury venires since this case was tried in February of 1972.

A year and a half after the trial and after the appeal was taken to the Florida Fourth District Court of Appeal, the Florida legislature removed all disabilities of non-age to persons in Florida who were eighteen years of age or older by Chapter 73-21, Laws of Florida (Section 1.01 (14), F.S.). Thus, subsequent to July 1, 1973, jury venires throughout the State of Florida were made up of individuals over the age of eighteen who were registered to vote and with no exemption from service for those individuals over the age of sixty-five:

> 40.01 Qualifications and disqualifications of jurors.—
>
> *(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state and who have resided in this state for one year and in their respective counties for six months and who are fully qualified electors of their respective counties; provided, however, that expectant mothers and mothers with children under eighteen years of age, upon their request, shall be exempted from grand and petit jury duty.

---

* *Note*—Ch. 73-21, Laws of Florida, removed the disability of non-age for persons 18 years of age and older.

cf.—§ 1.01(14) Definition of minor.

§ 743.07 Rights, privileges and obligations of persons 18 years of age or older.

So that there would be as little lag time as possible in implementing this change of status for those persons

eighteen, nineteen and twenty years old, the various Supervisors of Elections were each specifically informed of the legislative change and directed to include these new adults on jury venires. This July 1973 change has now been fully implemented. See *Reed* v. *State,* 292 So. 2d 7 (Fla., 1974).

The petitioners have implied that persons over the age of sixty-five are still not included on jury venires without requesting to serve. This simply is not true. The Florida Legislature has repealed all but two of the original personal exemptions from jury duty: practicing attorneys (Section 40.08, F.S.) and expectant mothers or mothers with children under eighteen years of age (when request is so made). No other categories of exemptions exist in Florida today.

As was pointed out in the respondents' brief in opposition to the Petition for Writ of Certiorari, the exemption for individuals over the age of sixty-five was repealed prior to the time of this trial. However, due to lack of notification of this repeal and certain lag time in making up new jury venires, these individuals had not yet been included on the venire that was used at the time of this February 1972 trial.

The Florida Supreme Court has held that this lag in implementation of the legislative changes in the composition of jury venires is constitutional, relying on authorities pronounced by this Court. See *Reed, supra.* The repeal of personal exemptions for individuals over the age of sixty-five from jury service is in force throughout the whole State of Florida.

The case of *Healy* v. *Edwards,* 363 F. Supp. 1110 (E.D. La., 1973), relied on by petitioners, is totally

inapplicable to Florida juries. In 1967 the Florida legislature repealed the personal exemption for women and replaced it with the current exemption for expectant mothers and those mothers with children under eighteen years of age requesting such exemption. See Chapter 67-154, Laws of Florida, or Section 40.01(1), F.S.

If the *Healy* case, *supra,* had been tried in Florida, that three-judge panel would have found that Florida had been in compliance with their opinion for the last seven years.

Respondents suggest that there was no constitutional taint on the jury venire in this case and that the petition for writ of certiorari should be denied.

II

The United States Supreme Court Should Not Reverse This Cause and Remand It for a New Trial in Accordance with the Doctrine of Comparative Negligence Adopted by the Florida Supreme Court Subsequent to the Trial of This Cause.

The case of *Hoffman* v. *Jones,* 280 So. 2d 431 (Fla., 1973) (A. 1a-22a), relied on by petitioners, simply has no application whatsoever to the instant case.

The petitioners have either totally misinterpreted the holding of the Florida Supreme Court in *Hoffman, supra,* or are misstating the ruling of the Florida Supreme Court to this Court.

The Florida Supreme Court went to great lengths to hold that its decision in *Hoffman, supra,* would not be applied retroactively, but would only be applied to future cases, cases then pending, and cases on appeal

in which the points had been appropriately raised *at the trial court,* at page 440:

> [16] Under the circumstances, we hold that this opinion shall be applied as follows:
>
> 1. As to those cases in which the comparative negligence rule has been applied, this opinion shall be applicable.
>
> 2. As to those cases already commenced, but in which trial has not yet begun, this opinion shall be applicable.
>
> 3. *As to those cases in which trial has already begun or in which verdict or judgment has already been rendered, this opinion shall not be applicable,* unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage of the litigation.
>
> 4. As to those cases on appeal in which the applicability of the comparative negligence rule *has been properly and appropriately made a question of appellate review,* this opinion shall be applicable.
>
> 5. This opinion shall be applicable to all cases commenced after the decision becomes final.

At no time during the proceedings in the trial court did the petitioners make any request having the slightest thing to do with comparative negligence, nor did they raise comparative negligence in the District Court of Appeal or Supreme Court of Florida proceedings.

The respondents suggest that the petitioners do not come within the confines of the Florida Supreme Court's holding in *Hoffman, supra,* and that the petition for writ of certiorari should be denied.

CONCLUSION

Based on the authorities and arguments cited herein, it is respectfully suggested that the petition for writ of certiorari be denied.

Respectfully submitted,

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764-3000, 945-2686
Attorneys for Respondents

APPENDIX

SUPREME COURT OF FLORIDA.

NO. 43443.

PHILIP FRANCIS HOFFMAN, JR., and PAY-A-WAY CORPORATION, a Florida corporation, *Petitioners,*

v.

HAZEL J. JONES, as Administratrix of the Estate of William Harrison Jones, Jr., Deceased, *Respondent.*

July 10, 1973.

Edna L. Caruso of Howell, Kirby, Montgomery, D'Aiuto, Dean & Hallowes, West Palm Beach, for petitioners.

Sammy Cacciatore of Nance & Cacciatore, Melbourne, for respondent.

E. Harper Field and Frank C. Amatea of Keen, O'Kelley & Spitz, Tallahassee, for amicus curiae, Fla. Defense Lawyers Ass'n.

C. Graham Carothers and C. DuBose Ausley of Ausley, Ausley, McMullen, McGehee & Carothers, Tallahassee, for amicus curiae, Fla. Railroad Ass'n.

Kenneth L. Ryskamp, of Bolles, Goodwin, Ryskamp & Welcher, Miami, for amicus curiae, Fla. East Coast Railway Co.

William B. Killian, of McCarthy, Steel, Hector & Davis, Miami, for amicus curiae, Fla. Power & Light Co.

Sam H. Mann, Jr. and John T. Allen, Jr., of Harrison, Greene, Mann, Davenport, Rowe & Stanton, St. Petersburg, for amicus curiae, Fla. Power Corp.

Raymond Ehrlich and James E. Cobb, Jacksonville, for amicus curiae, American Mutual Ins. Alliance, American Ins. Asso., and National Asso. of Independent Insurers.

Thomas W. McAliley of Beckham & McAliley, Miami, for amicus curiae, United Transportation Union, Fla. Legislative Boards of Railroad Brotherhoods and the Fla. AFL-CIO.

ADKINS, Justice.

This cause is here on petition for writ of certiorari supported by certificate of the District Court of Appeal, Fourth District, that its decision (Jones v. Hoffman, 272 So.2d 529) is one which involves a question of great public interest. See Fla Const., art. V, § 3(b)(3), F.S.A.

The question certified by the District Court of Appeal is:

> "Whether or not the Court should replace the contributory negligence rule with the principles of comparative negligence?"

The District Court of Appeal answered the certified question in the affirmative and reversed the trial court in the case *sub judice* for following the precedent set down by this Court in Louisville and Nashville Railroad Co. v. Yniestra, 21 Fla. 700 (1886). This early case specifically held the contributory negligence rule to be the law of Florida, and it has uniformly been followed by the courts of the State ever since. The District Court of Appeal attempted, therefore, to overrule all precedent of this Court in the area of contributory negligence and to establish comparative negligence as the proper test. In so doing, the District Court has exceeded its authority.

In a dissenting opinion, Judge Owen stated well the position of the District Court of Appeal when in disagreement with controlling precedent set down by this Court:

> "[I]f and when such a change is to be wrought by the judiciary, it should be at the hands of the Supreme Court rather than the District Court of Appeal. . . . The majority decision would appear to flatly overrule

a multitude of prior decisions of our Supreme Court, a prerogative which we do not enjoy." Jones v. Hoffman, 272 So.2d 529, p. 534.

The other District Courts of Appeal have recognized the relationship between their authority and that of this Court. Griffin v. State, 202 So.2d 602 (Fla. App. 1st, 1967); Roberts v. State, 199 So.2d 340 (Fla. App. 2d, 1967); and United States v. State, 179 So.2d 890 (Fla. App. 3d, 1965). To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level. Ever since the District Court rendered its opinion there has been great confusion and much delay in the trial courts of the District Court of Appeal, Fourth District, while the attorneys and judges alike have been awaiting our decision in this case.

We point out that the mere certification to this Court by a District Court of Appeal that its decision involves a question of great public interest does not vest this Court with jurisdiction. If neither party involved petitioned here for a writ of certiorari, we would not have jurisdiction to answer the question certified or to review the District Court's action.

This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court.

Prior to answering the question certified, we must also consider our own power and authority to replace the rule of contributory negligence with that of comparative negligence. It has been suggested that such a change in the common law of Florida is properly within the province

only of the Legislature, and not of the courts. We cannot agree.

The rule that contributory negligence is an absolute bar to recovery was—as most tort law—a judicial creation, and it was specifically judicially adopted in Florida in Louisville and Nashville Railroad Co. v. Yniestra, *supra.* Most scholars attribute the origin of this rule to the English case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), although as much as thirty years later—in Raisin v. Mitchell, 9 Car. & P. 613, 173 Eng.Rep. 979 (C.P.1839)—contributory negligence was held not to be a complete bar to recovery. Maloney, From Contributory to Comparative Negligence: A Needed Law Reform, 11 U.Fla.L.Rev. 135, 141-142 (1958). Although "contributory negligence" itself had been mentioned in some earlier cases, our research reveals that prior to 1809 (as well as for a time after that date) there was no clear-cut, common law rule that contributory negligence was a complete defense to an action based on negligence. Most probably, the common law was the same in this regard as English maritime law and the civil law—i.e., damages were apportioned when both plaintiff and defendant were at fault. See Maloney, *supra,* page 152. Many authorities declare that early references to "contributory negligence" did not concern contributory negligence as we are familiar with it—i.e., lack of due care by the plaintiff which contributes to his injuries—but that it originally meant a plaintiff's own negligent act which was the effective, *direct cause* of the accident in which he was injured. E. G., Turk, Comparative Negligence on the March, 28 Chi-Kent L. Rev., 189, p. 196 (1950).

Prior to Butterfield v. Forrester, *supra,* there was no clear-cut pronouncement of the contributory negligence rule, so it must be said that "judicial thinking" culminated in the implicit pronouncement of the contributory negligence rule in the 1809 decision of Butterfield v. Forrester, *supra.* In view of the fact that prior to *Butterfield* contributory

negligence was a matter of judicial thought rather than judicial pronouncement, it cannot be said that the common law was "clear and free from doubt," so as to make it a part of the statute law of this State by virtue of Fla. Stat., § 2.01, F.S.A.

As we stated in Duval v. Thomas, 114 So. 2d 791, 795 (Fla. 1959), it is "only when the common law is plain that we must observe it." We also said in this case,

> "[W]hen grave doubt exists of a true common law doctrine . . . we may, as was written in Ripley v. Ewell, supra, [61 So. 2d 420], exercise a 'broad discretion' taking 'into account the changes in our social and economic customs and present day conceptions of right and justice.'"

Even if it be said that the present bar of contributory negligence is a part of our common law by virtue of prior judicial decision, it is also true from *Duval* that this Court may change the rule where great social upheaval dictates. It has been modified in many instances by judicial decision, such as those establishing the doctrine of "last clear chance," "appreciable degree" and others. See Negligence. Application of the Last Clear Chance Doctrine by Kenneth M. Myers, 8 Fla. Law Rev. 336 (1955). In a large measure the rule has been transfigured from any "statutory creation" by virtue of our adoption of the common law (if such it were) into decisional law by virtue of various court refinements. We have in the past, with hesitation, modified the common law in justified instances, and this is as it should be. Randolph v. Randolph, 146 Fla. 491, 1 So. 2d 480 (1941), modified the common law doctrine that gave a father the superior right to the custody of a child; Banfield v. Addington, 104 Fla. 661, 140 So. 893 (1932), removed the common law exemption of a married woman from causes of action based on contract or mixed contracts in tort.

In Waller v. First Savings & Trust Co., 103 Fla. 1025, 138 So. 780 (1931), this Court refused to follow the common law principle that an action for personal injuries was abated upon the death of the tort-feasor, the Court saying:

> "This court has expressly recognized the principle that in specific instances certain rules which were admittedly a part of the old English common law did not become a part of the Florida common law, because contrary to our customs, institutions, or intendments of our statutes on other subjects." (p. 784)

This Court receded from the common law and held, in Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957), that a municipal corporation may be held liable for the torts of police officers under the doctrine of *respondant superior,* saying:

> "Tracing the rule to its ultimate progenitor we are led to the English case of Russel v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. R. 359 (1788).
>
> . . . . .
>
> "Assuming that the immunity rule had its inception in the Men of Devon case, and most legal historians agree that it did, it should be noted that this case was decided in 1788, some twelve years after our Declaration of Independence. Be that as it may, our own feeling is that *the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated."* (Emphasis supplied) (p. 132)

Gates v. Foley, 247 So. 2d 40 (Fla. 1971), established the right of a wife to recover for the loss of consortium as a result of her husband's injuries. This decision receded from Ripley v. Ewell, 61 So. 2d 420 (Fla. 1952) and abrogated a common law principle, saying:

> "It may be argued that any change in this rule should come from the Legislature. No recitation of authority

is needed to indicate that this Court has not been backward in overturning unsound precedent in the area of tort law. *Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.*" (Emphasis supplied) 247 So. 2d 40, p. 43

All rules of the common law are designed for application to new conditions and circumstances as they may be developed by enlightened commercial and business intercourse and are intended to be vitalized by practical application in advanced society. One of the most pressing social problems facing us today is the automobile accident problem, for the bulk of tort litigation involves the dangerous instrumentality known as the automobile. Our society must be concerned with accident prevention and compensation of victims of accidents. The Legislature of Florida has made great progress in legislation geared for accident prevention. The prevention of accidents, of course, is much more satisfying than the compensation of victims, but we must recognize the problem of determining a method of securing just and adequate compensation of accident victims who have a good cause of action.

The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question. The rule of contributory negligence as a complete bar to recovery was imported into the law by judges. Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss

among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

We are, therefore, of the opinion that we do have the power and authority to reexamine the position we have taken in regard to contributory negligence and to alter the rule we have adopted previously in light of current "social and economic customs" and modern "conceptions of right and justice."

Use of the terms "contributory negligence" and "comparative negligence" is slightly confusing. The two theories now commonly known by these terms both recognize that negligence of a plaintiff may play a part in causing his injuries and that the damages he is allowed to recover should, therefore, be diminished to some extent. The "contributory negligence" theory, of course, *completely* bars recovery, while the "comparative negligence" theory is that a plaintiff is prevented from recovering only that proportion of his damages for which he is responsible.

The demise of the absolute-bar theory of contributory negligence has been urged by many American scholars in the law of torts. It has been abolished in almost every common law nation in the world, including England—its country of origin—and every one of the Canadian Provinces. Some form of compartive negligence now exists in Austria, France, Germany, Portugal, Switzerland, Italy, China, Japan, Persia, Poland, Russia, Siam and Turkey. Maloney, *supra,* page 154.

Also, our research reveals that sixteen states have so far adopted some form of the comparative negligence doctrine.

One reason for the abandonment of the contributory negligence theory is that the initial justification for establishing the complete defense is no longer valid. It is generally accepted that, historically, contributory negligence was adopted "to protect the essential growth of industries, particularly transportation." Institute of Judicial Adminis-

tration, Comparative Negligence—1954 Supplement, at page 2. Modern economic and social customs, however, favor the individual, not industry.

We find that none of the justifications for denying any recovery to a plaintiff, who has contributed to his own injuries to any extent, has any validity in this age.

Perhaps the best argument in favor of the movement from contributory to comparative negligence is that the latter is simply a more equitable system of determining liability and a more socially desirable method of loss distribution. The injustice which occurs when a plaintiff suffers severe injuries as the result of an accident for which he is only slightly responsible, and is thereby denied any damages, is readily apparent. The rule of contributory negligence is a harsh one which either places the burden of a loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.

In an effort to ameliorate the harshness of contributory negligence, other doctrines have evolved in tort law as "gross, willful, and wanton" negligence, "last clear chance" and the application of absolute liability in certain instances. Those who defend the doctrine of contributory negligence argue that the rule is also not as harsh in its practical effect as it is in theory. This is so, they say, because juries tend to disregard the instructions given by the trial judge in an effort to afford some measure of rough justice to the injured party. We agree with Dean Maloney that,

> "[T]here is something basically wrong with a rule of law that is so contrary to the settled convictions of

> the lay community that laymen will almost always refuse to enforce it, even when solemnly told to do so by a judge whose instructions they have sworn to follow.
>
> . . . . .
>
> "[The disrespect for law engendered by putting our citizens in a position in which they feel it is necessary to deliberately violate the law is not something to be lightly brushed aside; and it comes ill from the mouths of lawyers, who as officers of the courts have sworn to uphold the law, to defend the present system by arguing that it works because jurors can be trusted to disregard that very law." 11 U. Fla. L. Rev. 135, pp. 151-152 (1958).

In Connolly v. Steakley, 197 So. 2d 524, 537 (Fla. 1967), Mr. Justice O'Connell referred to contributory negligence as a "primitive device for achieving justice as between parties who are both at fault." Even Mr. Chief Justice McWhorter, in authoring the decision which specifically held the contributory negligence doctrine to be the law of this State, referred to it as "unjust and inequitable." Louisville and Nashville Railroad Co. v. Yniestra, *supra*, 21 Fla. p. 738.

Eighty-seven years after that decision, we find ourselves still laboring under a rule of law that has long been recognized as inequitable. The Legislature did enact a statute in 1887 which applied the principle of comparative negligence to railroad accidents. We held the statute unconstitutional under the due process and equal protection clauses of the Federal and State constitutions because it was of limited scope and not of *general* application. Georgia Southern & Florida Railway Co. v. Seven-Up Bottling Co., 175 So. 2d 39 (Fla. 1965). Our Legislature again addressed the problem in 1943, when a comparative negligence statute of general application was passed by both houses. This bill was vetoed by the Governor and the Legislature would

not override the veto. Senate Journal, Regular Session, 1943, pp. 716-717. One man thus prevented this State from now operating under a much more equitable system of recovery for negligent personal injuries and property damage. Since that "defeat," the Legislature has done little to discard the harsh and inequitable contributory negligence rule, perhaps because it considers the problem to be a judicial one.

Since we definitely consider the problem to be a judicial one, we feel the time has come for this Court to join what seems to be a trend toward almost universal adoption of comparative negligence. A primary function of a court is to see that legal conflicts are equitably resolved. In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.

Therefore, we now hold that a plaintiff in an action based on negligence will no longer be denied any recovery because of his contributory negligence.

If it appears from the evidence that both plaintiff and defendant were guilty of negligence which was, in some degree, a legal cause of the injury to the plaintiff, this does not defeat the plaintiff's recovery entirely. The jury in assessing damages would in that event award to the plaintiff such damages as in the jury's judgment the negligence of the defendant caused to the plaintiff. In other words, the jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant. See Florida Cent. & P. R. (1899).

This rule should not be construed so as to entitle a person to recover for damage in a case where the proof

shows that the defendant could not by the exercise of due care have prevented the injury, or where the defendant's negligence was not a legal cause of the damage. Stated differently, there can be no apportionment of negligence where the negligence of the defendant is not directly a legal cause of the result complained of by the plaintiff. A plaintiff is barred from recovering damages for loss or injury caused by the negligence of another only when the plaintiff's negligence is the sole legal cause of the damage, or the negligence of the plaintiff and some person or persons other than the defendant or defendants was the sole legal cause of the damage.

If plaintiff and defendant are both at fault, the former may recover, but the amount of his recovery may be only such proportion of the entire damages plaintiff sustained as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant. For example, where it is found that the plaintiff's negligence is at least equal to that of the defendant, the amount awarded to the plaintiff should be reduced by one-half from what it otherwise would have been.

The doctrine of last clear chance would, of course, no longer have any application in these cases. See Martin v. Sussman, 82 So. 2d 597 (Fla. 1955).

We decline herein to dissect and discuss all the possible variations of comparative negligence which have been adopted in other jurisdictions. Countless law review commentaries and treatises can be found which have covered almost every conceivable mutation of the basic doctrine. Suffice it to say that we consider the "pure form" of comparative negligence—as we have phrased it above—to be the most equitable method of allocating damages in negligence actions.

In the usual situation where the negligence of the plaintiff is at issue, as well as that of the defendant, there will

undoubtedly be a counterclaim filed. The cross-plaintiff (just as plaintiff in the main suit) guilty of some degree of negligence would be entitled to a verdict awarding him such damages as in the jury's judgment were proportionate with his negligence and the negligence of cross-defendant. This could result in two verdicts—one for plaintiff and one for cross-plaintiff. In such event the Court should enter one judgment in favor of the party receiving the larger verdict, the amount of which should be the difference between the two verdicts. This is in keeping with the long recognized principles of "set off" in contract litigation. The Court's primary responsibility is to enter a judgment which reflects the true intent of the jury, as expressed in its verdict or verdicts.

In rare cases the net result of two such claims will be that the party more responsible for an accident will recover more than the party less responsible. On the surface, this might seem inequitable. However, using an extreme example, let us assume that a plaintiff is 80 per cent responsible for an automobile accident and suffers $20,000 in damages, and that the defendant—20 per cent responsible—fortunately suffers no damages. The liability of the defendant in such a case should not depend upon what damages he *suffered*, but upon what damages he *caused*. If a jury found that this defendant had been negligent and that his negligence, in relation to that of the plaintiff, was 20 per cent responsible for causing the accident then he should pay 20 per cent of the total damages, regardless of the fact that he has been fortunate enough to not be damaged personally.

Petitioners in this cause, and various amicus curiae who have filed briefs have raised many points which they claim we must consider in adopting comparative negligence, such as the effects of such a change on the concept of "assumption of risk," and no "contribution" between joint tortfeasors. We decline to consider all those issues, however,

for two reasons. One reason is that we already have a body of case law in this State dealing with comparative negligence, under our earlier railroad statute. Much of this case law will be applicable under the comparative negligence rule we are now adopting generally.

The other reason is that it is not the proper function of this Court to decide unripe issues, without the benefit of adequate briefing, not involving an actual controversy, and unrelated to a specific factual situation.

We are fully confident that the trial court judges of this State can adequately handle any problems created by our change to a comparative negligence rule as these problems arise. The answers to many of the problems will be obvious in light of the purposes for which we adopt the rule stated above:

> (1) To allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss or injury; and
>
> (2) To apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.

In accomplishing these purposes, the trial court is authorized to require special verdicts to be returned by the jury and to enter such judgment or judgments as may truly reflect the intent of the jury as expressed in any verdict or verdicts which may be returned.

We recognize the thousands of pending negligence cases affected by this decision. In fact, the prospect of a general upheaval in pending tort litigation has always been a deterring influence in considering the adoption of a comparative negligence rule. See Annotation, The Doctrine of Comparative Negligence, 32 ALR 3d 463, p. 487. We feel the trial judges of this State are capable of applying this com-

parative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion.

Determining the time when the comparative negligence rule shall be applied at the trial level presents another problem. The confusion created by the premature adoption of the comparative negligence rule by the District Court of Appeal is further exemplified by the fact that some trial judges, relying on the decision, have applied the rule in the trial of many cases. Other trial judges have conducted their trials in accordance with the law of contributory negligence.

We hold that a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida. In the event of a conflict between the decision of a District Court of Appeal and this Court, the decision of this Court shall prevail until overruled by a subsequent decision of this Court.

Under the circumstances, we hold that this opinion shall be applied as follows:

1. As to those cases in which the comparative negligence rule has been applied, this opinion shall be applicable.

2. As to those cases already commenced, but in which trial has not yet begun, this opinion shall be applicable.

3. As to those cases in which trial has already begun or in which verdict or judgment has already been rendered, this opinion shall not be applicable, unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage of the litigation.

4. As to those cases on appeal in which the applicability of the comparative negligence rule has been properly and appropriately made a question of appellate review, this opinion shall be applicable.

5. This opinion shall be applicable to all cases commenced after the decision becomes final.

The certified question having now been answered in full, this cause is remanded to the District Court of Appeal, Fourth District, to be further remanded to the Circuit Court for a new trial.

In order to finalize the determination of the question in this case as expeditiously as possible, this decision is made effective immediately and a petition for rehearing will not be allowed.

It is so ordered.

CARLTON, C. J., and ERVIN, BOYD, MCCAIN and DEKLE, JJ., concur.

ROBERTS, J., dissents with opinion.

ROBERTS, Justice (dissenting)

I must respectfully dissent from the majority opinion in this cause My primary concern is whether this Court is empowered to reject and replace the established doctrine of contributory negligence by judicial decree.

The sovereign powers of this State are divided into three coordinate branches of government—legislative, judicial and executive—by the Constitution of Florida, Article II, Section 3. Our Constitution specifically prohibits a person belonging to one of such branches from exercising any powers "appertaining to either of the other branches unless expressly provided herein." This Court has been diligent in preserving and maintaining the doctrine of separation of powers, which doctrine was imbedded in both the state and federal constitutions at the threshhold of consti-

tutional democracy in this country, and under which doctrine the judiciary has no power to make statutory law. State ex rel. Hanbury v. Tunnicliffe, 98 Fla. 731, 124 So. 279 (1929), Carlton v. Matthews, 103 Fla. 301, 137 So. 815 (1931), State v. Herndon, 158 Fla. 115, 27 So.2d 833 (1946), Hancock v. Board of Public Instruction of Charlotte County, 158 So.2d 519 (Fla. 1963), Holley v. Adams, 238 So.2d 401 (Fla. 1970), State v. Barquet, 262 So.2d 431 (Fla. 1972).

In the case of Ponder v. Graham, 4 Fla. 23, 25 (1851), this Court emphatically stated,

> "The fundamental principle of every free and good government is, that these several co-ordinate departments forever remain separate and distinct. No maxim in political science is more fully recognized than this. Its necessity was recognized by the framers of our government, as one too invaluable to be surrendered, and too sacred to be tampered with. Every other political principle is subordinate to it—for it is this which gives to our system energy, vitality and stability. Montesquieu says there can be no liberty, where the judicial are not separated from the legislative powers. 1 Spirit of Laws, page 181. Mr. Madison says these departments should remain forever separate and distinct, and that there is no political truth of greater intrinsic value, and which is stamped with the authority or more enlightened patrons of liberty. Federalist, 270."

Applying this well established doctrine, we held that the matter of changing statutory law is not one to be indulged by the Court, but is a legislative function. Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228 (1938). Therein, this Court also reaffirmed the principle that the common law, if not abrogated by statute or constitutional provision is in full force and effect in this state. See also Bryan v. Landis, 106 Fla. 19, 142 So. 650 (1932), Wilson v.

Renfroe, 91 So.2d 857 (Fla.1957), Brooks v. City of West Miami, 246 So.2d 115 (Fla.App.1971).

It is the statutory law of this state that,

> "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state." Florida Statutes, Section 2.01, F.S.A.

The doctrine of contributory negligence was a part of the common law of England prior to July 4, 1776, and therefore, is part of the common law of this state pursuant to Florida Statutes, Section 2.01, F.S.A., and is secure from the desires of this Court to supplant it by the doctrine of comparative negligence, provided that it is not inconsistent with the Constitution and laws of the United States and the Constitution and acts of the Legislature of this state. Ripley v. Ewell, 61 So.2d 420 (Fla.1952) Duval v. Thomas, 114 So.2d 791 (Fla.1959). Furthermore, we have held that courts are bound by the rule of stare decisis to follow common law as it has been judicially declared in previously adjudicated cases. Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933).

The question presently before this Court is whether this Court replace the doctrine of contributory negligence with the concept of comparative negligence. Sub judice, by applying the doctrine of contributory negligence, the trial court correctly followed the precedent set down by this Court in Louisville and Nashville Railroad Co. v. Yniestra, 21 Fla. 700 (1886), and its progeny. This Court in *Yniestra* recognized and described contributory negligence as "the law as it unquestionably stands," 21 Fla. 700, p. 737. We said, "If Mr. Yniestra was himself negligent, and

that negligence was the proximate cause of his death, the *law* calls that contributory negligence, and the plaintiff could not recover."

Although the case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K.B.1809), is recognized as a leading case in the area of contributory negligence, such case was not the first pronouncement of the common law doctrine of contributor negligence. Lord Ellenborough wrote in Butterfield v. Forrester, supra,

> "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." 11 East 60, 61.

The brief opinions of Bayley, J. and Lord Ellenborough in *Forrester* were merely a restatement of the concept of common law contributory negligence. If this case was the origin of common law contributory negligence, then clearly it would not have been adopted as part of the statutory law of this state through Florida Statutes, Section 2.01, F.S.A., because that decision was rendered subsequent to July 4, 1776.

I note with much interest the comment by Wex S. Malone in, "The Formative Era of Contributory Negligence," 41 Illinois Law Review, 151 to the following effect:

> "The concise opinions of Bayley and Lord Ellenborough in Butterfield v. Forrester (1809) afford no indication that either of those judges felt at the time that he was charting new paths for law."

Contributory negligence was adopted much earlier as a part of the common law. In Bayly v. Merrell, Cro.Jac. 386, 79 Eng. Rep. 331 (1606), the Court explicated,

> "[I]f he doubted of the weight thereof, he might have weighed it; and was not bound to give credence

> to another's speech; *and being his own negligence,* he is without remedy." (Emphasis supplied) Cro.Jac. 386, p. 387, 79 Eng. Rep. 331.

Charles Beach in 1882 traced the doctrine of contributory negligence back to its origin in his treatise on contributory negligence, wherein he set out,

> "Our Anglo-American law of Negligence, including, as of course, that of Contributory Negligence, has come down to us, in ordinary generation, from the civil law of imperial Rome. It is a part of that great debt which the common law owes to the classical and the scholastic jurisprudence." Beach on Contributory Negligence, § 1, p. 1 (1882). See also: Beach on Contributory Negligence, 2d Ed., § 1, p. 1 (1892), and Beach on Contributory Negligence, 3d Ed., Crawford, § 1, p. 1 (1899).

Although he expressed a personal view of dislike for the operation of the principle of contributory negligence, Chief Justice McWhorter recognized in Louisville and Nashville Railroad Co. v. Yniestra, supra, the inability of this Court to change the common law rule of contributory negligence when he applied the existing law required to the facts of the case before him. He observed,

> "The law, in cases at least where human life is concerned, certainly needs *legislative* revision." (Emphasis supplied) 21 Fla. 700, p. 738.

By virtue of Florida Statutes, Section 2.01, contributory negligence is in force and said doctrine can be modified or replaced only by legislation to the contrary. Interposition of judicial power to make a legislative change in a statute which the Legislature on numerous occasions has refused to do is a clear invasion of the legislative.

Co-Operative Sanitary Banking Co. v. Shields, 71 Fla. 110, 70 So. 934 (1916), involved a personal injury suit wherein plaintiff sought to recover damages for injuries sustained through the alleged negligence of defendant. Therein, this Court stated, inter alia, that at common law a plaintiff could not recover for injuries to himself caused by the negligence of another if he in any appreciable way contributed to the proximate cause of injury, upon the theory that there is no apportionment of the results of mutual negligence. See also German-American Lumber Co. v. Hannah, 60 Fla. 76, 53 So. 516, 30 L.R.A. (N.S.) 882. In the *Shields* case, this Court explicitly recited,

> "The only modification of this common-law principle which the Legislature of this state has seen fit to make is in regard to injuries occasioned by railroad companies. See sections 3148, 3149, and 3150 of the General Statutes. *If this common-law principle is to be still further modified, it must be done by the Legislature, as it is beyond the power and province of the courts.* We would also refer to Coronet Phosphate Co. v. Jackson, 65 Fla. 170, 61 So. 318, and Wauchula Manufacturing & Timber Co. v. Jackson, 70 Fla. 596, 70 So. 599, decided here at the last term, wherein we followed the principles enunciated in German-American Lumber Co. v. Hannah, supra. If the evidence adduced in the instant case established the fact that the plaintiff's own negligence contributed to the proximate cause of the injuries which he received, then he cannot recover, even though it is also established by the evidence that the defendant was likewise guilty of negligence, whether by acts of commission or omission, which contributed to or formed a part of the proximate cause of the injury. In order to determine this point a careful examination of the evidence is requisite." (Emphasis supplied) supra, 70 So. at p. 936.

In fine, the primary question is not whether or not the law of contributory negligence should be changed, but rather, who should do the changing. Contributory negligence was recognized in the common law as far back as A.D. 1606 and made a part of the statute law of this State in A. D. 1829, and thus far not changed by statute. If such a fundamental change is to be made in the law, then such modification should be made by the legislature where proposed change will be considered by legislative committees in public hearing where the general public may have an opportunity to be heard and should not be made by judicial fiat. Such an excursion into the field of legislative jurisdiction weakens the concept of separation of powers and our tripartite system of government.

For the foregoing reasons, I respectfully dissent.

COURT, U. S.

NOV 8 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually,

Petitioners,

vs.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN,

Respondents.

PETITION FOR REHEARING

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1935

JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually,

Petitioners,

vs.

CITY OF FORT LAUDERDALE, a municipal corporation, and LEO RICHARD PAULIN,

Respondents.

PETITION FOR REHEARING

PREFACE

This Petition for Rehearing is filed by Petitioners, JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually, pursuant to Rule 58, United States Supreme Court Rules.

CERTIFICATE OF COUNSEL

The undersigned, counsel for Petitioners, JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually, hereby certifies that the Petition for Rehearing filed herewith is presented in good faith and not for delay, and restricted to substantial grounds available to petitioners, although not previously presented or to intervening circumstances of substantial or controlling effect.

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PETITION FOR REHEARING

The Petitioners, JAMES CHARLES PAYNE, a minor, by and through his next friend and father, WALTER PAYNE, and WALTER PAYNE, individually, by and through their undersigned attorneys, file this their Petition for Rehearing from the decision of this Court on October 15, 1974, denying the Petition for a Writ of Certiorari in this cause, and as grounds therefore would show this Court the following:

1. By opinion dated July 10, 1973, the Supreme Court of the State of Florida in the case of *Hoffman* v. *Jones*, Fla. 1973, 280 So.2d 431 adopted the doctrine of comparative negligence under which a litigant's recovery would be reduced only in proportion to his own negligence and not eliminated altogether by any negligence which might be found to have contributed to his injuries. In so ruling, the Florida Supreme Court reversed controlling precedent of the law of the State of Florida set down by the Florida Supreme Court in *Louisville and Nashville Railroad Company* v. *Ynestra*, (1886) 21 Fla. 700, and justifiably relied upon by counsel for Petitioners in prosecuting this negligence action, which was terminated on February 25, 1972, by the entry of a judgment on jury verdicts in favor of Respondents and against Petitioners. In *Hoffman* v. *Jones*, the Supreme Court of Florida held that its opinion would be applicable to those cases in which judgment had already been rendered if the applicability of the comparative negligence rule were raised during some state of the litigation.

2. The recent case of *Fitzsimmons* v. *City of Pensacola*, Fla. App. 1974, the applicability of which decision was not previously presented for this Court's considera-

tion to the instant cause, held that the applicability of the Supreme Court decision in the case of *Hoffman* v. *Jones* could be raised by appellants in their brief, the manner of raising such issue, thereby making comparative negligence properly a question of appellate review and thus rendering the Supreme Court decision in the case of *Hoffman* v. *Jones* applicable to the case under the *Hoffman* v. *Jones* savings provision.

3. Accordingly, Petitioners submit that since the applicability of comparative negligence was raised in Petitioners' reply and supplemental brief in support of this Petition for Writ of Certiorari to the Supreme Court of the State of Florida, Petitioners respectfully petition this Court for a rehearing and a reconsideration of the issues and facts raised in this Petition.

CONCLUSION

Based on the authorities and argument cited herein, it is respectfully submitted that the Petition for Rehearing in this cause should be granted and that the Petition for Writ of Certiorari should be granted and/or this cause remanded to the trial court for a new trial in light of the Florida Supreme Court's adoption of a doctrine of comparative negligence.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing has been mailed to Frank E. Maloney, Esq., Attorney for Respondent, American National Bank Building, Fort Lauderdale, Florida 33304, this 6th day of November, 1974.

DRUCK, GRIMMETT, NORMAN & WEAVER
Post Office Box 1262
Fort Lauderdale, Florida 33302
Telephone: (305) 525-8531
Attorneys for Petitioners

By JAMES D. DRUCK

APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D. C. 20543

October 15, 1974

William M. O'Bryan, Esq.
Fleming, O'Bryan and Fleming
American Nat'l Bank Bldg.
1415 Sunrise Blvd.
Fort Lauderdale, Fla. 33304

RE: PAYNE, ETC., ET AL v. CITY OF FORT LAUDERDALE, ET AL., 73-1935

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case. Mr. Justice Douglas would grant certiorari.

Very truly yours,

Michael Rodak, Jr., Clerk
By /s/ Helen Taylor, (Mrs.)
Assistant Clerk

Diane D. Hathaway, Esq.
P. O. Box 1262—707 S.E. 3d Ave.
Ft. Lauderdale, Fla. 33302

Robert A. FITZSIMMONS, a minor, by his father and next friend, Thomas A. Fitzsimmons, and Thomas A. Fitzsimmons, Individually, Appellants,

v.

CITY OF PENSACOLA, a municipal corporation, Appellee.

No. T-108.

District Court of Appeal of Florida, First District.

June 20, 1974.

Rehearing Denied July 19, 1974.

Action was brought against city to recover for personal injury arising out of an accident. The Circuit Court, Escambia County, Ralph M. McLane, J., entered final summary judgment in favor of city, and plaintiffs appealed. The District Court of Appeal, Boyer, J., held that appellants, by raising in their briefs the applicability of Supreme Court decision, rendered after appeal was taken and adopting comparative negligence rule, properly made comparative negligence a question of appellate review thus rendering Supreme Court decision applicable to case under decision's savings provision.

Final summary judgment quashed with directions.

1. Appeal and Error (Key) 1107

An appellate court, in reviewing a judgment on direct appeal, will dispose of case according to law prevailing at time of appellate disposition, and not according to law prevailing at time of rendition of judgment appealed.

2. Appeal and Error (Key) 1107

In action against city to recover for personal injury, appellants by raising in their briefs the applicability of Supreme Court decision, rendered after appeal was taken and adopting comparative negligence rule, properly made comparative negligence a question of appellate review thus rendering Supreme Court decision applicable to case under decision's savings provision.

3. Courts (Key) 91(2)

Trial court is bound by decisions of District Court of Appeal just as District Court of Appeal follow controlling precedents set by Florida Supreme Court.

R. P. Warfield, Levin, Warfield, Graff, Mabie & Rosenbloum, Pensacola, for appellants.

Robert P. Gaines, Beggs, Lane, Daniel, Gaines & Davis, Pensacola, for appellee.

BOYER, Judge.

We have for review a final summary judgment in favor of the defendant below, City of Pensacola, entered by the Circuit Judge in a personal injury action.

The accident giving rise to the controversy occurred on August 12, 1971. Suit was commenced on August 10, 1972, and the summary final judgment here for review was entered February 26, 1973. In the meantime, after the complaint was filed but before entry of the summary final judgment, the District Court of Appeal, Fourth District, on February 8, 1973 filed its opinion in Jones v. Hoffman, Fla.App. (4th) 1973, 272 So.2d 529, by which it decided that contributory negligence should no longer bar recovery

in an action to recover damages for negligence resulting in injury, but rather that the comparative negligence doctrine should apply. Notice of appeal was filed herein on March 28, 1973. On July 10, 1973, prior to this case becoming ripe for determination in this Court, the Supreme Court of Florida entered and filed its historic landmark decision in Hoffman v. Jones, Sup.Ct.Fla.1973, 280 So.2d 431, by which it announced in clear and unmistakable terms that the District Court of Appeal are without authority to overrule controlling precedents of the Supreme Court and are bound to follow the case law set forth by the Supreme Court, but went on to hold that contributory negligence would no longer be a complete bar to recovery; instituting, by that opinion, comparative negligence as the rule to be applied.

Appellants, in light of the Hoffman case, raised the applicability of its doctrine to the case sub judice in appellants' main brief filed herein, appellee responded in its brief and appellants again urged the applicability of the Hoffman doctrine (comparative negligence doctrine) in their reply brief.

Appellants candidly admit that neither the comparative negligence doctrine nor the decision of the Fourth District in Jones v. Hoffman, supra, were raised in any manner at the trial level. However, appellants urge that even without applying the Hoffman doctrine (comparative negligence) the trial judge erred in the entry of the summary final judgment now appealed. Our examination of the record reveals that contention to be without merit, therefore the sole issue to be resolved by us is whether the opinion of the Supreme Court of Florida in Hoffman v. Jones, supra, is applicable to the case sub judice.

As we read the language of the Supreme Court in Hoffman v. Jones, supra, the opinion of the Fourth Dis-

trict Court in Jones v. Hoffman, supra, insofar as it affected the law of the State of Florida, was completely ineffective. The pertinent portions of the Supreme Court's opinion, in that regard, are as follows:

"* * * The District Court of Appeal attempted, therefore, to overrule all precedent of this Court in the area of contributory negligence and to establish comparative negligence as the proper test. In so doing, the District Court has exceeded its authority." (280 So.2d at page 433)

* * *

"* * * To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level. Ever since the District Court rendered its opinion there has been great confusion and much delay in the trial courts of the District Court of Appeal, Fourth District, while the attorneys and judges alike have been awaiting our decision in this case.

* * *

"This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court." (at page 434)

* * *

"We hold that a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida. In the event of a conflict between the decision of a District Court of Appeal and this Court, *the decision of this Court shall prevail*

until overruled by a subsequent decision of this Court." (Emphasis added; at page 440)

Accordingly, the Supreme Court's decision in Hoffman, which admittedly wrought extensive and significant change in the law of this State, had the same general effect as would have resulted from the passage of an act by the legislature abolishing contributory negligence and instituting comparative negligence in its place and stead.

Recognizing the impact of its opinion, the Supreme Court announced the circumstances under which its opinion should be applied, as follows:

"Under the circumstances, we hold that this opinion shall be applied as follows:

"1. As to those cases in which the comparative negligence rule has been applied, this opinion shall be applicable.

"2. As to those cases already commenced, but in which trial has not yet begun, this opinion shall be applicable.

"3. As to those cases in which trial has already begun or in which verdict or judgment has already been rendered, this opinion shall not be applicable, unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage of the litigation.

"4. As to those cases on appeal in which the applicability of the comparative negligence rule has been properly and appropriately made a question of appellate review, this opinion shall be applicable.

"5. This opinion shall be applicable to all cases commenced after the decision becomes final." (280 So.2d at page 440)

In Williams v. Seaboard Airline Railroad Co., Sup. Ct.Fla.1973, 283 So.2d 33, the court considered for a second time a case which had initially been tried under the "now defunct railroad comparative negligence statute" but which was tried the second time under the body of law which existed after Georgia Southern & Florida Ry. Co. v. Seven-Up Bott. Co., Sup.Ct.Fla.1965, 175 So.2d 39, and before Hoffman; holding that since the cause was initially tried under the principles of comparative negligence, the applicability of the comparative negligence rule had been "appropriately and properly raised during some stage of the litigation" and that therefore the Hoffman opinion was applicable.

In 1934, long before Hoffman, the Supreme Court of Florida, in Winter Park Golf Estates, Inc. v. City of Winter Park, 114 Fla. 350, 153 So. 342, considered a case which was "argued and submitted" prior to a decision of the court which had the effect of changing the applicable law. The court there stated:

> "In order that the present case may be reconsidered in the court below in the light of the rule of law stated in the above-mentioned cases decided here *subsequent to the entry of the present appeal in this case,* it is ordered that the decree appealed from be reversed without prejudice and that this cause be remanded to the circuit court for further proceedings therein, with leave to each of the parties to make such amendments to the pleadings and to offer such additional evidence as the Chancellor may allow in order to have the controversy properly re-presented to the court for reconsideration *in the light of applicable provisions of law.* * * *" (Emphasis added; 153 So. at page 843)

In Florida East Coast Railway Company v. Rouse, Sup.Ct.Fla.1967, 194 So.2d 260, the court had for consideration an appeal in a case which had been tried under the railroad comparative negligence statute (Florida Statute 768.06 F.S.A.). After entry of final judgment but prior to the date of oral argument in the District Court of Appeal, the Supreme Court rendered its decision in Georgia Southern & Florida Ry. Co. v. Seven-Up Bott. Co., supra, holding said Florida Statute 768.06, F.S.A., the railroad comparative negligence statute, unconstitutional. To use the language of the author of the Supreme Court opinion: "In other words, the cause sub judice was tried under the law of Florida as it was prior to the decision last above cited and the appeal in the District Court was considered after that decision was rendered." The District Court of Appeal held that the giving of an instruction on comparative negligence pursuant to the statute which was subsequently held by the Supreme Court to be invalid did not constitute fundamental error which could be raised for the first time on appeal. The Supreme Court reversed saying:

> "Although not applied because the appellate court thought the point, not raised at the trial level, could not be considered on appeal, the District Court correctly stated the controlling rule of law in this language:
>
> ' "We recognize the general and Florida rule to be that an appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition, and not according to the law prevailing at the time of rendition of the judgment appealed.'
>
> "A change in the state of the law, intervening between trial and appeal, seldom occurs and is usually not

foreseeable. The change in this cause was not foreseeable, the comparative negligence statute having been held valid in 1942. Nevertheless, and notwithstanding the failure of the parties, at the trial level, to attack the validity of the statute, the appellate court was required to apply the law as it existed at the time of appeal." (194 So.2d at pages 261 and 262; footnote omitted)

The Supreme Court, in deciding Florida East Coast Railway Company v. Rouse, supra, cited and quoted at length from Winter Park Golf Estates v. City of Winter Park supra, and in addition cited with approval General Capital Corporation v. Tel Service Co., Fla.App.(2d) 1966, 183 So.2d 1, quoting from the latter the following:

" 'It is apparent that Section 687.07, Florida Statutes, 1963, F.S.A., was the basis of the proceedings below. However, subsequent to the entry of the final decree and the filing of the notice of appeal, Chapter 65-299, Laws of Florida 1965, was enacted, the provisions of which may have some effect on Section 687.07. The appellant has filed a motion here for application of the intervening legislation, and the appellee has filed a suggestion of the unconstitutionality of intervening legislation, plus a motion for an order suspending appellate proceedings, and remanding the cause to the trial court for consideration of its suggestion of unconstitutionality. Since we have a law of the State of Florida which intervenes subsequent to the law on which this case was originally decided, we temporarily relinquish jurisdiction over this cause and remand it to the lower court for reconsideration and redetermination of the issues that may arise in view of the 1965 Act. * * *' " (194 So.2d at page 262)

In Thornton v. Elliott, Sup.Ct.1974, 288 So.2d 254, the Supreme Court held that where, in a case tried before its opinion in Hoffman, under the body of law then existing and applicable, the jury during its deliberations returned to the courtroom and asked the judge: "If one party is more negligent than the other, what is the law?", the applicability of comparative negligence was appropriately raised during the trial, notwithstanding that comparative negligence was not raised prior to appeal by the parties, their attorneys nor the court, saying:

> "It appears to us the jury itself, the trier of facts, by its question was taking a more advanced view of the law from the nature of the facts before it and wanted to be advised if it could compare the negligence of the parties in arriving at its verdict. This the trial judge instructed the jury it could not do. The trial judge thus expressly rejected application of the comparative negligence doctrine to the facts of the case and in effect forbid its availability.
>
> "The Jury's question to the trial judge appears to fit the saving provision in item 3 quoted above, 'unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage of the litigation.' Thus it would appear the jury was more clairvoyant or perceptive concerning what the law should be and would soon be than the trial judge and the parties litigant who were hobbled in the trial process by existing appellate precedents.
>
> "The clarification the jury sought taken in the light of the subsequent change of the law comes squarely within the applicable rule announced in Florida East Coast Railway Company v. Rouse, supra, and Winter Park Golf Estates, Inc. v. City of Winter Park, 114

Fla. 350, 163 So. 842. In the latter cited case, which *Rouse* expressly followed, it was held: Where law applicable to case had been determined by Supreme Court since *present* case was argued and submitted, case would be remanded for reconsideration in the light of law as so recently stated.

"In *Rouse*, a certiorari case, it was held that

> " 'between trial judgment and appeal, there was a change in law which affected the result and, in consequence, certiorari must be granted, the decision under review quashed without prejudice and the cause remanded with directions to remand for a new trial.'

"Obviously our savings provisions in Hoffman v. Jones were written in the light of the *Rouse* and *Winter Park Golf Estates* cases.

"It appears to us that on the basis of the record herein and the points explicated in our opinion, Petitioner is entitled to relief. Accordingly, the final judgment below is quashed with direction that the case be retried in the light of our holding in Hoffman v. Jones, supra." (288 So.2d at pages 255 and 256)

[1, 2] The Supreme Court has, therefore, expressly adopted the reasoning of the Rouse and Winter Park Golf Estates cases as applicable to situations arising under Hoffman. Applying therefore the rule approved in Rouse to be that an appellate court, in reviewing a judgment on direct appeal, will dispose of the case according to the law prevailing at the time of the appellate disposition and not according to the law prevailing at the time of rendition of the judgment appealed, it appears inescapable that the Hoffman opinion is applicable to the case sub judice. It will be noted that in Thornton v. Elliott, supra,

the writer of the opinion specifically stated that the savings provisions in Hoffman v. Jones were written in the light of the Rouse and Winter Park Golf Estates cases. Accordingly it appears that the savings provision in Hoffman to the effect that the comparative negligence rule would be applicable if "appropriately and properly raised during *some state of the litigation*" applies to that stage of the litigation involving the appellate process. Further, it would appear that the appellants, by raising the applicability of Hoffman in their briefs have "properly and appropriately made [comparative negligence] a question of appellate review," thus rendering the opinion applicable under the fourth numbered savings provision as set forth in Hoffman. (See also, to the same effect, Ingerson v. State Farm Mutual Automobile Ins. Co., Fla.App.(3d) 1973, 272 So.2d 862.)

We have not overlooked the opinion of our sister court of the Third District in Butler v. Woolco Department Store, Fla.App.(3d) 1973, 284 So.2d 434. However there the writer of the opinion went to great lengths to point out that there was "nothing in the appeal papers or the brief of the appellant relating to the applicability of the rule of comparative negligence as pronounced in *Hoffman*" and that therefore "it could not be said that the applicability of that rule had 'been properly and appropriately made a question of appellate review.' "

[3] We take no pleasure in reversing the learned trial judge for applying the law, as we too would have done, which was unquestionably in effect at the time this case was before him. However, alas, the forces of change, like those of time and age, respect no man, regardless of the position he enjoys: And as stated by the Supreme Court in State v. Lott, Sup.Ct.Fla.1973, 286 So.2d 565 "[t]he trial court is bound by the decisions of this Court

just as the District Courts of Appeal follow controlling precedents set by the Florida Supreme Court."

Accordingly, the final summary judgment entered by the trial judge is quashed with directions that the case be tried in the light of the holding of the Supreme Court in Hoffman v. Jones, supra, and in accordance with the views expressed herein.

It is so ordered.

RAWLS, C. J., and McCORD, J., concur.